Supreme Court, U.S.
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91-1418

No. _____

In The
Supreme Court of the United States
October Term, 1991

HARRY K. SINGLETARY, as
Secretary, Department of Corrections,
State of Florida,

Petitioner,

v.

OMAR BLANCO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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COUNSELS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FEDERAL DISTRICT COURT HAS UNFETTERED DISCRETION TO HOLD AN EVIDENTIARY HEARING PURSUANT TO *TOWNSEND V. SAIN*, 372 U.S. 293 (1963) AND TITLE 28 U.S.C. § 2254(d), WHEN THE STATE PETITIONER NEITHER ALLEGED NOR PROVED THAT THE FACT-FINDING PROCEDURE EMPLOYED BY THE STATE COURT WAS INADEQUATE OR DID NOT AFFORD HIM A FULL AND FAIR EVIDENTIARY HEARING OR THAT THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED?

II. WHETHER THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *HARRIS V. RIVERA*, 454 U.S. 339 (1981), *WALTON V. ARIZONA*, 491 U.S. ___, 110 S.Ct. 3047 (1990), AND *HITCHCOCK V. DUGGER*, 481 U.S. 393 (1987), IN THAT THE ELEVENTH CIRCUIT FOUND THAT THE SENTENCING JUDGE CONSIDERED AND RELIED UPON ALLEGEDLY CONFIDENTIAL AND DAMAGING INFORMATION IN SENTENCING THE RESPONDENT TO DEATH, WHERE THE ORDER IMPOSING THE DEATH SENTENCE CONTAINS NO REFERENCE TO SAID INFORMATION AND THE SENTENCING JUDGE EXPRESSLY AND SPECIFICALLY DENIED CONSIDERING SUCH INFORMATION IN SENTENCING RESPONDENT TO DEATH?

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OPINIONS BELOW

The decision of the Unites States Court of Appeals for the Eleventh Circuit is reported as *Blanco v. Singletary,* 943 F.2d 1477 (11th Cir. 1991), and is reproduced in the Appendix at A1–A-86. The order denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on December 2, 1991, is as yet unreported but is reproduced in the Appendix at A-87–A-88. The opinion of the United States District Court for the Southern District of Florida is reported as *Blanco v. Dugger,* 691 F.Supp. 308 (S.D. Fla. 1988), and is reproduced in the Appendix at A-89–A-149.

The decision of the Supreme Court of the State of Florida denying the Respondent's requests for post-conviction relief is reported as *Blanco v. Wainwright,* 507 So.2d 1377 (Fla. 1987), and is reproduced in the Appendix at A-150–A-167. The order of the state trial court denying the Respondent's motion for post-conviction relief, rendered on April 21, 1986, is unreported, but reproduced in the Appendix at A-168–A-187.

The decision of the Supreme Court of the State of Florida affirming the Respondent's convictions and sentence is reported as *Blanco v. State,* 452 So.2d 520 (Fla. 1984), *cert. denied, Blanco v. State,* 469 U.S. 1181 (1985), and is reproduced in the Appendix at A-188–A-202. The sentencing order of the state trial court, rendered on June 21, 1982, is unreported but reproduced in the Appendix at A-203–A-211.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on September 30, 1991. The Petitioner timely petitioned for

rehearing. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 2, 1991. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provisions and statutes controlling the disposition of this cause are lengthy. *See* Amendments VI and XIV of the Constitution of the United States; Title 28, United States Code, Section 1254(1); Title 28, United States Code, Section 2254; Rule 8 of the Rules Governing Habeas Corpus Proceedings; Section 921.141, Florida Statutes (1981); Section 947.16, Florida Statutes (1981). The pertinent text of each, set out verbatim appears in the Appendix at pages A-212–A-220.

STATEMENT OF THE CASE

The Respondent, Omar Blanco, was indicted for the crimes of armed burglary and first degree murder. On January 14, 1982, at approximately 11:00 p.m., fourteen year old Thalia Vezos was in her bed reading at her home in Fort Lauderdale, Florida, when she saw a man, who she later identified as the Respondent, standing in the hall holding a gun and carrying a brown wallet-type object under his arm. The Respondent indicated that Thalia was to keep quiet. He then cut the telephone wires in her room. Thalia's uncle, John Ryan, appeared in the hall and tried to take the gun from the Respondent. Ryan was shot in the scuffle and landed on top of his niece on the bed. The Respondent shot Ryan six (6) more times, and then fled the house. The Respondent was stopped approximately one and one-half miles from the scene, after having matched a BOLO description. A man's purse containing the Respondent's ID papers and a watch belonging to Thalia Vezos was found near the door to Thalia's bedroom.

On June 11, 1982, after trial by jury, the Respondent was convicted of armed burglary and first degree murder. On June 15, 1982, the sentencing hearing, pursuant to section 921.141, Florida Statutes (1981), commenced before the jury. The state introduced evidence of a prior armed burglary and armed robbery convictions. The Respondent presented no evidence. Counsel for Respondent argued that life imprisonment without the possibility of parole for twenty-five (25) years was as bad a punishment as death, and requested mercy. By a vote of eight (8) to four (4) the jury recommended that the judge impose a sentence of death.

On June 21, 1982, the trial judge rendered his written sentencing order. The trial judge agreed with the jury's recommendation and found four (4) statutory aggravating circumstances applicable: (1) previous conviction of a violent

felony; (2) murder committed during the course of a burglary and for pecuniary gain; (3) murder was especially heinous, atrocious and cruel; (4) murder was cold, calculated and premeditated. After weighing the aggravating factors against no mitigating factors, the trial judge sentenced the Respondent to death for his conviction of first degree murder. (A-203–A-211). Immediately thereafter, in the same sentencing order, the trial judge sentenced the Respondent to seventy-five (75) years in prison for armed burglary. In so doing, the trial judge in providing his required reasons for retaining jurisdiction over the Respondent's possible parole, state:

> [D]uring the sentencing phase of the trial for Murder in the First Degree, Omar Blanco, indicated he did not wish to speak on his own behalf or present any evidence regarding mitigation. He further stated that he did not care if the jury returned an advisory sentence of life or death. This expression by the Defendant, Omar Blanco, indicates to this Court that the Defendant, Omar Blanco's, lack of concern for his own life manifests that he would be a dangerous person to return to society. The Defendant, Omar Blanco's, attitude also corroborates his prior exhibitions of utter disregard for the rights and safety of society.
>
> (A-210).

The Respondent's convictions and sentences were affirmed by the Supreme Court of the State of Florida on direct appeal. *Blanco v. State,* 452 So.2d 520 (Fla.1984). This court denied the Respondent's petition for Writ of Certiorari. *Blanco v. Florida,* 469 U.S. 1181 (1985).

On January 7, 1986, the Governor of Florida signed a death warrant for the Respondent. The execution was scheduled for February 4, 1986. On January 31, 1986, the

Respondent filed a motion to vacate judgment and sentence in the trial court, pursuant to Rule 3.850 of the **Florida Rules of Criminal Procedure.** Among the eleven (11) issues raised were the claims that Respondent's counsel provided ineffective assistance at his sentencing proceedings, by failing to investigate and present available mitigating evidence and that a conflict of interest was created by the trial court's inquires of counsel and the Respondent prior to and during the sentencing phase. On the same day, the Respondent also filed a petition for writ of habeas corpus in the Supreme Court of the State of Florida.

On February 3, 1986, an evidentiary hearing on the Respondent's claims in his motion for post-conviction relief began before the original trial judge. After calling three (3) witnesses and indicating that a number of other witnesses would be presented, the trial judge entered an order staying the Respondent's execution. An additional witness was called and the trial judge continued the evidentiary hearing until February 27, 1986. After receiving a request for a continuance by Respondent, the trial judge continued the evidentiary hearing until March 20, 1986. On March 20 and 21, 1986, Respondent presented an additional eight (8) witnesses, as well as a statement by collateral counsel. The State presented the testimony of Carlos Rodriquez, one of the Respondent's original trial attorneys. At the conclusion of the hearing, the trial judge granted the Respondent's request for fifteen (15) days to file a memorandum of law. On April 4, 1986, Respondent requested additional time to file a memorandum, which was denied by the trial judge. On April 21, 1986, the trial judge entered a sixteen (16) page order, denying the Respondent's motion to vacate judgment and sentence. (A-168–A-187).

The Respondent appealed the denial of his post-conviction motion to the Supreme Court of Florida. The Supreme Court of Florida affirmed the trial judge's order, and also denied

the Respondent's petition for writ of habeas corpus in a consolidated opinion. *Blanco v. Wainwright,* 507 So.2d 1377 (Fla.1987). (A-150–A-167).

On August 18, 1987, the Governor of Florida signed a second death warrant for Respondent. The execution was scheduled for September 17, 1987. On September 16, 1987, Respondent filed an application for stay of execution and a petition for writ of habeas corpus pursuant to Title 28 U.S.C. § 2254, in the United States District Court for the Southern District of Florida. The District Court ordered an indefinite stay of execution. Over the objection of the Petitioner, that the Respondent did not meet the criteria under Title 28 U.S.C. § 2254(d) or *Townsend v. Sain,* 372 U.S. 293 (1963), the District Court ordered that an evidentiary hearing would be held on the Respondent's petition for writ of habeas corpus.

On January 4 and 5, 1988, the evidentiary hearing was held before the District Court. At the evidentiary hearing the Respondent presented the testimony of both his original trial counsel, Carlos Rodriguez and Don Tenbrook, and also the testimony of Dr. Harry Krop, Dr. Dorita Marina, Albert F. Winkler and Jerry Justine. None of these witnesses, except for Carlos Rodriguez, testified at the state evidentiary hearing.[1]

On July 11, 1988, the District Court issued an opinion denying in part and granting in part, the petition for writ of habeas corpus. The District Court ordered that the Respondent be granted a new sentencing hearing on two grounds: 1) that the instructions to the jury in the

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1 The witnesses present at the state evidentiary hearing were Carlos Rodriguez, Felix-Masud-Piloto, Ph.D., Ivan Clark, Ph.D., Siro Del Castillo, Rudolfo Blanco, Rosa Pinillos, Simeon Pinillos, Geraldo Luis Herrara, Martha Venegas, Barbara Pinillos, Consuela Cardoza and Dr. Fernando Melendez.

sentencing phase by the trial court and the prosecutor violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and 2) that trial counsel provided ineffective assistance by revealing "confidences and secrets" to the sentencing judge which prejudiced the defense case. *Blanco v. Dugger, supra,* 691 F.Supp. at 331-333. (A-89–A-149).

The Petitioner appealed to the Court of Appeals for the Eleventh Circuit. On September 30, 1991, the Eleventh Circuit issued its opinion affirming the District Court's order partially granting the petition for writ of habeas corpus. The Eleventh Circuit agreed that the Respondent was entitled to a new sentencing hearing, but its reasons were different in part from the District Court. The Eleventh Circuit agreed that trial counsel provided ineffective assistance by revealing damaging "confidences and secrets" to the sentencing judge. *Blanco v. Singletary, supra,* 943 F.2d at 1499-1500, 1503-1505 (A-1–A-86). In so doing, the Eleventh Circuit rejected the Petitioner's argument that because there was no record indication that the sentencing judge considered the impermissible information, the federal court, under *Harris v. Rivera,* 454 U.S. 339 (1981) should not have presumed otherwise. *Blanco v. Singletary, supra,* 943 F.2d at 1504-1505.

The Eleventh Circuit also found, contrary to the District Court, that trial counsel provided ineffective assistance at the sentencing hearing by failing to investigate and present mitigating evidence, i.e., family members, mental health experts, and that such failure was prejudicial to the Respondent. *Blanco v. Singletary, supra,* 943 F.2d at 1500-1503.[2] The Eleventh Circuit, in finding that there was a reasonable probability that the jury might have

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2 The *Caldwell v. Mississippi, supra,* jury instruction issue was apparently abandoned by the Eleventh Circuit due to the intervening case of *Dugger v. Adams,* 489 U.S. 401 (1989).

recommended life absent trial counsels' errors, relied on mental health evidence presented for the first time at the federal evidentiary hearing. *Blanco v. Singletary, supra,* 943 F.2d at 1501, 1505. The Petitioner filed for rehearing and rehearing en banc. Said Petition was denied. (A-88–A-89). This Petition for Writ of Certiorari follows:

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW PRESENTS IMPORTANT BUT UNANSWERED QUESTIONS CONCERNING WHETHER A FEDERAL DISTRICT COURT HAS UNFETTERED DISCRETION TO HOLD AN EVIDENTIARY HEARING PURSUANT TO *TOWNSEND V. SAIN,* 372 U.S. 293 (1963), AND TITLE 28 U.S.C. § 2254(d) WHEN THE STATE PETITIONER NEITHER ALLEGED NOR PROVED THAT THE FACT-FINDING PROCEDURE EMPLOYED BY THE STATE COURT WAS INADEQUATE OR DID NOT AFFORD HIM A FULL AND FAIR EVIDENTIARY HEARING OR THAT THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED.

The Eleventh Circuit Court of Appeals affirmed the district court's order granting the Respondent's petition for writ of habeas corpus filed pursuant to Title 28 U.S.C. § 2254, finding that Respondent's trial counsel provided ineffective assistance at his sentencing hearing. Of particular importance to the Eleventh Circuit's ruling was testimony concerning Respondent's mental health and the availability of certain mitigation witnesses.

When presented with this claim in the state post-conviction proceedings, the state trial court held an extensive evidentiary hearing. At the conclusion of that hearing, the

state court made various findings of fact including rejecting the testimony of the mental health expert called by the Respondent. The state trial court, based on its findings of fact, concluded that trial counsels' performance was not ineffective under this Court's decision in *Strickland v. Washington,* 466 U.S. 668 (1984).

After the Supreme Court of the State of Florida affirmed the state trial court's order, the Respondent raised essentially the same claim before the district court in his petition for writ of habeas corpus. The Respondent, in his petition, requested another evidentiary hearing before the district court. The Petitioner argued that the Respondent was not entitled to an evidentiary hearing because he did not meet the criteria under Title 28 U.S.C. § 2254(d) or *Townsend v. Sain,* 372 U.S. 293 (1963), in that he failed to allege or prove that the fact-finding procedures employed by the state court was inadequate or did not afford him a full or fair evidentiary hearing or that the material facts were not adequately developed. Despite that argument which was undisputed by Respondent, the district court ordered an evidentiary hearing.

Ironically, the district court did not grant habeas corpus relief based on the evidence produced at the federal evidentiary hearing.[3] Rather, the district court believed that relief was appropriate based on the state trial transcript. *Blanco v. Dugger,* 691 F.Supp. 308 (S.D. Fla.1991). On appeal, the Eleventh Circuit affirmed in part the district court's grant of habeas corpus relief but in doing so relied extensively on the evidence adduced at the federal evidentiary hearing.

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3 As stated *supra,* the district court granted habeas corpus relief on the following claims: 1) that trial counsel provided ineffective assistance by revealing damaging confidences and secrets to the trial judge, and 2) that trial counsel were ineffective for failing to investigate and present mitigating evidence.

Blanco v. Singletary, 943 F.2d 1477 (11th Cir.1991). The Eleventh Circuit stated:

> Blanco also presented evidence of organic brain damage and epileptic disorders. One of Blanco's psychiatric witnesses of the *federal* evidentiary hearing testified that Blanco's IQ tested in the borderline range of intellectual functioning, between being mentally retarded and possessing low average mental ability. Blanco was diagnosed as suffering from psychotic, paranoid and depressive tendencies as well as exhibiting extremely poor contact with reality.[4] (emphasis added).

This court has long recognized that comity and finality must be considered in determining the proper scope of federal habeas review. *Teague v. Lane,* 489 U.S. 288, 308 (1989). The Eleventh Circuit's consideration of material not presented to the state trial court which presided over the collateral claims demonstrates the inherent unfairness to the state court's interest in comity and finality which results when a federal court improvidently grants an evidentiary hearing. The Eleventh Circuit's decision further cuts to and through the heart of Title 28 U.S.C. § 2254(d) as well as *Sumner v. Mata,* 455 U.S. 591 (1982), and the presumption of correctness which attaches to factual findings made by

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4 This evidence was in fact rejected by the district court which found Dr. Krop's incomplete evaluation of Respondent did not support Respondent's claims of mental problems. The district court further found that Dr. Marina's testimony was not credible.

state courts after a full and fair evidentiary on these same claims.[5]

Under current law, *Townsend v. Sain, supra,* defines the circumstances requiring a federal evidentiary hearing:

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts. 372 U.S. at 312-313 (footnote omitted).

Although this court stated that "[i]t would be unwise to overly particularize this test," it nevertheless set forth specific criteria that, if shown, necessitated an evidentiary hearing:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not

5 For example, the Eleventh Circuit, in finding that ample mitigating evidence could have been presented before the sentencing jury and judge, referred to testimony of the Respondent's brother and other family members. That reference ignored the state court's specific factual findings that these witnesses were either unavailable or unwilling to testify at the state court evidentiary hearing.

> afford the habeas applicant full and fair fact hearing.[6] *Id.* at 313.

This Court noted that the "final category is initially open-ended because we cannot anticipate all the situations wherein a hearing is demanded." *Id.* at 317. Beyond the circumstances for mandatory hearings, this Court gave district court's unlimited discretion to hold evidentiary hearings:

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. *If he concludes that the habeas application was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and originally should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.* *Id.* at 318 (emphasis added).

"Ordinarily," the complete record of state court proceedings is indispensable to determining whether the petitioner received a full and fair hearing in state court. *Id.* at 319. Nevertheless, "there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so. *Id.*

Coextensive with *Townsend v. Sain,* Title 28 U.S.C. § 2254(d), governs when a federal habeas corpus court must defer to state court factual findings. The statute provides that, when the state court has adjudicated the merits of a factual issue, the state court's findings are entitled to a presumption of

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6 As to factor (5), the Court required the petitioner to demonstrate that his failure to develop the material facts was not attributive to his "inexcusable neglect." *Id.* at 317.

correctness. *See Sumner v. Mata, supra.* Eight (8) listed exceptions are available to defeat the presumption. Title 28 U.S.C. § 2254(d). The statute does not address a petitioner's threshold entitlement to an evidentiary hearing. It is on this issue that Title 28 U.S.C. § 2254(d) and *Townsend v. Sain,* are materially different.

When Congress enacted section 2254(d), after *Townsend v. Sain,* the statutes were intended as limitations on the exercise of the federal court jurisdiction to review state court rulings. *Sumner v. Mata, supra.* Through the statutory presumption of correctness found in Title 28 U.S.C. § 2254(d), Congress limited but did not eliminate the power of federal habeas courts to reach a factual determination which were contrary to those of the state. *Id.* at 550-551. Under *Townsend v. Sain,* because federal courts retain unlimited power to hold evidentiary hearings even where the statutory presumption of correctness is applicable, no state finding is secure in its finality.

In 1976, Congress adopted Rule 8 of the Rules Governing Habeas Corpus Proceedings. Rule 8 provides in effect that "whether an evidentiary hearing is required" must be determined pursuant to recent case law. The Petitioner submits that this Court in the exercise of its supervisory authority may limit the discretion of the lower federal courts to hold such hearings.

This court in *McCleskey v. Zant,* 491 U.S. ___, 111 S.Ct. 1454 (1991), in determining when district court's could exercise its discretion in entertaining abusive petitions under Title 28 U.S.C. § 2254(b) and Rule 9(b) of the Rules Governing Habeas Corpus Proceedings, held that "Congress did not intend § 2254(b) to foreclose application of the court-announced principles defining and limiting a district court's discretion to entertain abusive petitions." 111 S.Ct. at 1466. This court thereafter defined and limited the

district court's discretion under Section 2254(b) and Rule 9(b). *Id.* at 1466-1471.

In *Coleman v. Thompson,* 491 U.S. ___, 111 S.Ct. 2546 (1991), this Court recognized that its prior decision in *Fay v. Noia,* 372 U.S. 391 (1963), was based on a conception of federal/state relations that undervalued the importance of state procedural rules, and that it now recognized the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. 111 S.Ct. at 2565. Petitioner submits that *McCleskey v. Zant* and *Coleman v. Thompson,* now compel the view that *Townsend v. Sain* failed to strike the proper balance between state and federal courts with respect to the adjudication of factual issues. *Townsend v. Sain,* went far beyond defining when an evidentiary hearing is mandatory. It gave federal courts unlimited discretion to hold such hearings. Petitioner submits that allowing federal courts unfettered discretion to hold evidentiary hearings is inconsistent with the doctrines of comity and finality as evidenced by this Court's decisions in *McCleskey v. Zant* and *Coleman v. Thompson.*

Petitioner submits this Court should exercise its certiorari jurisdiction to review the decision of the Eleventh Circuit.[7]

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7 This Court has granted certiorari in the related case of *Kennedy v. Tamayo-Reyes,* Case No. 90-1859, in which this Court is being asked to determine what the correct test is in determining when a federal habeas corpus petitioner will be excused for failing to develop a material fact in state court. A Brief Amici Curiae submitted by the states of California, Alabama, Arizona, Idaho, Montana, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee and Washington addresses the issue which is raised in this Petition for Writ of Certiorari.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *HARRIS V. RIVERA*, 454 U.S. 339 (1981), *WALTON V. ARIZONA*, 491 U.S. ___, 111 S.Ct. 3047 (1991), AND *HITCHCOCK V. DUGGER*, 481 U.S. 393 (1987), IN THAT THE ELEVENTH CIRCUIT FOUND THAT THE SENTENCING JUDGE CONSIDERED AND RELIED UPON ALLEGEDLY CONFIDENTIAL AND DAMAGING INFORMATION IN SENTENCING THE RESPONDENT TO DEATH, WHERE THE ORDER IMPOSING THE DEATH SENTENCE CONTAINS NO REFERENCE TO SAID INFORMATION AND THE SENTENCING JUDGE EXPRESSLY AND SPECIFICALLY DENIED CONSIDERING SUCH INFORMATION IN SENTENCING RESPONDENT TO DEATH.

After pronouncing the sentence of death upon Respondent for his conviction of first degree murder under Count I of the indictment, the trial judge sentenced the Respondent to a term of seventy-five (75) years in prison for his conviction on Count II, armed burglary. Thereafter, the trial judge entered an order retaining jurisdiction over one-third of the Respondent's sentence on Count II.

Under Section 947.16(3), Florida Statutes (1981), the trial judge was permitted to retain jurisdiction over one-third of the Respondent's sentence provided that it state the justification with individual particularity and such justification be made a part of the court record. *Rosa v. State,* 412 So.2d 891 (Fla.3rd DCA 1982). Pursuant to that statute, the trial judge made the following specific findings in support of its order retaining jurisdiction over Count II:

1. The defendant, Omar Blanco, has been convicted of numerous felonies involving violence, including murder in the first degree, armed robbery and armed burglary.

2. The crime committed involved the use of a firearm.

3. Despite the jury's verdict finding the defendant, Omar Blanco, guilty, and the overwhelming and uncontradicted evidence clearly demonstrating his guilt, the defendant, Omar Blanco, has consistently refused to acknowledge his deeds, and has shown absolutely no remorse whatsoever for the crimes that he committed.

4. That during the sentencing phase of the trial for murder in the first degree, the defendant, Omar Blanco, indicated he did not wish to speak in his own behalf or present any evidence regarding mitigation. He further stated that he did not care if the jury returned an advisory sentence of life or death. This expression by the defendant, Omar Blanco, indicates to this Court that the defendant, Omar Blanco's, lack of concern for his own life manifests that he would be a dangerous person to return to society. The defendant, Omar Blanco's, attitude also corroborates his prior exhibitions of utter disregard for the rights and safety of members of society.

5. The Court believes that it is in the best interest of society that the defendant, Omar Blanco, remain incarcerated for at least one-third of the sentence imposed. The Court's right to the invocation of retention of jurisdiction is to insure that the defendant, Omar Blanco, serves an appropriate term of incarceration.

The Eleventh Circuit held that Respondent was denied the effective assistance of counsel by his attorneys' disclosures of "...confidential, damaging information in

response to the [trial] court's inquiries," and that the trial court improperly considered these disclosures in sentencing Respondent to death. *Blanco v. Singletary,* 943 F.2d 1477, 1500 (11th Cir. 1991). The Eleventh Circuit based its holding on the trial court's order retaining jurisdiction over the Respondent's sentence on Count II. The Eleventh Circuit specifically held:

> We find that the trial court's statements indicate that the trial court considered Blanco's responses to the court's questions to be quite aggravating and that, regardless of whether the trial court could have put the sentiments out of mind is not in evidence, it in fact did not. It is true that the trial court's statements as to Blanco's lack of remorse were made in the course of the trial court's pronouncement of Blanco's sentence for armed robbery. However, the armed robbery sentence was pronounced concurrently with Blanco's death sentences, which indicates that these sentiments likely factored into the trial court's balancing of the aggravating and mitigating factors. And other disparaging statements by the trial court—to the effect that it was clear Blanco did not know anyone who thought enough of him to come to Court—were made during the course of Blanco's death sentencing proceeding. Given the lengthy controversy that occurred as the result of the trial court's inquiry into which witnesses Blanco would call, it would have been nearly impossible for the trial court not to have considered the lack of witnesses adversely to Blanco. Because these revelations were so prejudicial there is a reasonable probability that the trial court would have weighed the aggravating and mitigating circumstances differently.

Id. at 1505.

The Eleventh Circuit's presumption that it would be "...nearly impossible for the trial court not to have considered the lack of witnesses adversely to Blanco" conflicts with this Court's previous holding in *Harris v. Rivera, supra,* 454 U.S. at 346, in which this Court stated that in bench trials judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.

The Eleventh Circuit's decision also conflicts with this Court's decision in *Walton v. Arizona,* 491 U.S. ___, 111 S.Ct. 3047, 3057 (1990), wherein this Court held that sentencing judges are presumed to know the law and to apply it in making their decision regarding the applicability of aggravating factors. The Eleventh Circuit's decision likewise conflicts with this Court's holding in *Hitchcock v. Dugger,* 481 U.S. 393 (1987). In that case, this Court looked to the statements made by the trial judge in his capital sentencing order to determine whether he considered available nonstatutory mitigating evidence in sentencing the defendant to death. Because the sentencing order clearly indicated that the sentencing judge considered only statutory mitigating circumstances, this court found that this defendant's sentence of death was in violation of *Lockett v. Ohio,* 438 U.S. 586 (1978). This Court reached its decision by finding that the sentencing judge assumed that he was prohibited from considering nonstatutory mitigating evidence under then-existing Florida law as evidenced by the statements made in the judge's sentencing order. This Court was not persuaded otherwise by the fact that the defendant did present nonstatutory mitigating evidence at his capital sentencing hearing. Rather, this Court found that the sentencing judge's written order imposing the death penalty which contained no references to any consideration of nonstatutory mitigating evidence, to be dispositive. Thus, this Court in *Hitchcock v. Dugger* found that the sentencing judge followed what he thought to be the current state of the law as evidenced by his written sentencing order.

Clearly, the Eleventh Circuit's decision conflicts with this Court's holding in *Hitchcock v. Dugger, Harris v. Rivera* and *Walton v. Arizona.*[8] Although the Eleventh Circuit found that confidential, damaging information regarding the Respondent was revised to the sentencing judge, there is no record support for the Eleventh Circuit's presumption that such damaging information was considered by the sentencing judge in sentencing Respondent to death. The sentencing judge's order imposing the death penalty makes no reference whatsoever to this allegedly prejudicial information. The only reference to this information is in the sentencing judge's order sentencing Respondent on a separate conviction for armed burglary. There, the judge delineated, as required under Florida law, his reasons for retaining jurisdiction over one-third of the Respondent's sentence. Those reasons included the allegedly confidential and damaging information. Respondent has never challenged the propriety of the retention order.

Under *Harris v. Rivera, Walton v. Arizona* and *Hitchcock v. Dugger,* the Eleventh Circuit cannot presume that the sentencing judge improperly considered confidential, damaging information, in sentencing the Respondent to death where the order imposing the death sentence contains no such reference. Furthermore, the sentencing judge expressly stated in his order denying the motion to vacate judgment and sentence that:

> The Court would also note that this portion of the Order retaining jurisdiction which notes the Defendant's lack of remorse and failure to present mitigating evidence was included to show the

---

8 Petition does not concede that defense counsel revealed confidential and damaging information to the trial judge, and was ineffective in doing so. However, for purposes of this Petition for Writ of Certiorari, Petitioner will assume so and address the alleged prejudice resulting therefrom.

> Defendant would be a dangerous person to return to society. The Court, as the Order reflects, did not consider the same in imposing the death sentence.

Clearly, where the sentencing judge did not refer to the allegedly confidential and damaging information in its written order imposing the sentence of death, and expressly and specifically denied considering said information in it's order denying motion to vacate judgment and sentence, the Eleventh Circuit cannot presume that the sentencing judge considered this information in sentencing the Respondent to death.

The Eleventh Circuit further erred in finding that any reliance by the sentencing judge on this confidential and damaging information was prejudicial under *Strickland v. Washington, supra*. The advisory jury which did not hear this information and was not tainted recommended that the Respondent be sentenced to death, not life. The sentencing judge was required by Florida law to give great weight to the jury's recommendation. *LeDuc v. State,* 365 So.2d 149 (Fla.1978); *Tedder v. State,* 389 So.2d 22 (Fla.1977). Therefore, it is clear that there was no reasonable probability that the outcome of the sentencing proceedings would have been different had the sentencing judge not been aware of the allegedly confidential and damaging information.

This court should grant certiorari review where the Eleventh Circuit's decision conflicts with this Court's holdings in *Harris v. Rivera, Walton v. Arizona* and *Hitchcock v. Dugger.*

CONCLUSION

Based on the foregoing reasons, the Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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COUNSELS FOR PETITIONER

No. _____

In The

Supreme Court of the United States

October Term, 1991

HARRY K. SINGLETARY, as
Secretary, Department of Corrections,
State of Florida,

Petitioner,

v.

OMAR BLANCO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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COUNSELS FOR PETITIONER

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Omar BLANCO, Petitioner-Appellee, Cross-Appellant,

v.

Harry K. SINGLETARY, as Secretary, Department of Corrections, State of Florida, Respondent-Appellant, Cross-Appellee.

No. 88-5758.

United States Court of Appeals, Eleventh Circuit.

Sept. 30, 1991.

Defendant sought federal habeas corpus relief after his state conviction for capital murder and armed robbery was affirmed. The United States District Court for the Southern District of Florida, No. 87-6685-CIV, Alcee L. Hastings, J., 691 F.Supp. 308, granted writ of habeas corpus, and state appealed. The Court of Appeals, Clark, Senior Circuit Judge, held that: (1) defense counsel's acquiescence in trial court's intervention in defense strategy did not result in ineffective assistance during guilt phase; (2) counsel was ineffective in failing to present mitigating evidence at sentencing phase; and (3) counsel's failure to ensure presence of interpreter during civil proceeding did not result in prejudice.

Affirmed.

1. Criminal Law 641.12(1)

Although trial court overreached its authority and infringed upon relationship between defendant and counsel in capital murder prosecution by requiring defense counsel to call additional witnesses, trial court's actions and defense counsel's responses did not prejudice defendant during guilt phase, as required to show ineffective assistance of counsel; testimony of witnesses called at defendant's request, and over defense counsel's objection, was essentially in accordance with that already presented by other defense witnesses.

2. Criminal Law 1163(2)

Trial court's interference with conduct of defense during guilt phase of capital murder prosecution would not be presumed prejudicial where interference amounted to countermanding attorneys' strategic defense not to call two witnesses and did not otherwise hamper counsel's guilt phase defense. U.S.C.A. Const.Amend. 6.

3. Criminal Law 641.13(2), 1163(2)

Brief lapse in representation by counsel is not total absence of counsel or prohibition from providing assistance necessary for presumption of prejudice to apply.

4. Criminal Law 641.13(2)

Even though defendant essentially represented himself as to decision to call defense witnesses over defense counsel's objections, failure to conduct competence inquiry did not result in presumed prejudice in light of brevity of lapse of representation where attorneys advised defendant as to reasons they did not think additional witnesses should be

called; brief lapse was not total absence of counsel or prohibition from providing assistance. U.S.C.A. Const.Amend. 6.

5. Criminal Law 641.5, 641.13(2)

Defense counsel's acquiescence in and failure to object to trial court's interference in defense strategy in capital murder prosecution was not equivalent of actively representing conflicting interest and, thus, prejudice to defendant was not presumed. U.S.C.A. Const.Amend. 6.

6. Criminal Law 641.13(7)

Defendant was denied effective assistance of counsel by his attorneys' disclosures at sentencing phase of capital murder prosecution where, in response to trial court's questioning, counsel informed court that there was no potential mitigating evidence and that none could be found. U.S.C.A. Const.Amend. 6.

7. Criminal Law 641.13(7)

In order to determine whether counsel's failure to present penalty phase mitigating evidence is deficient, court considers whether reasonable investigation should have uncovered mitigating evidence, and, if so, whether failure to put evidence before jury was tactical choice by counsel. U.S.C.A. Const.Amend. 6.

8. Criminal Law 641.13(7)

Evidence showed that defense counsel in capital murder prosecution failed to conduct reasonable investigation of mitigating evidence at sentencing phase, which failure was not result of tactical choice, and, thus, defendant received ineffective assistance of counsel; at state collateral relief

court and federal district court, defendant showed that ample mitigating evidence could have been presented to sentencing jury and judge.

9. Criminal Law 641.13(7)

Defense counsel provided ineffective assistance by failing to present evidence relating to defendant's background at sentencing phase of capital murder prosecution; saving time consuming task of assembling mitigation witnesses until after verdict in guilt phase resulted in inadequate investigation. U.S.C.A. Const.Amend. 6.

10. Criminal Law 641.13(7)

Defendant's desires not to present mitigating evidence at sentencing phase of capital murder prosecution did not terminate counsel's responsibilities.

11. Criminal Law 986.2(1)

Defendant may be competent to stand trial but still suffer from mental health problems that sentencing jury and judge should have opportunity to consider.

12. Criminal Law 641.13(7)

Defendant received ineffective assistance of counsel as result of counsel's failure to investigate defendant's mental health status in connection with mitigating evidence to be presented at sentencing phase of capital murder prosecution; counsel informed court after brief discussion with defendant that no mental health mitigation evidence existed, even though counsel had not investigated availability of metal health mitigating evidence and evidence was in fact available.

13. Criminal Law 1208.1(4, 6)

When defendant challenges death sentence, question is whether there is reasonable probability that, absent errors, sentencer would have concluded that balance of aggravating and mitigating circumstances did not warrant death.

14. Criminal Law 641.13(7)

Defense counsel's volunteering information concerning lack of mitigating evidence in sentencing phase of capital murder prosecution resulted in ineffective assistance of counsel; as result of counsel's comments, trial court concluded that defendant's family and friends were unwilling to testify in his behalf, that there was no available mitigating evidence, and that defendant did not care what punishment was imposed.

15. Criminal Law 641.13(7)

Defendant was clearly prejudiced by defense counsel's volunteering information that no mitigating evidence existed at sentencing phase of capital murder prosecution; in light of recommendation of death sentence by vote of eight to four, failure to present available mitigating evidence gave rise to reasonable probability that, with that evidence, jury might have recommended life sentence.

16. Habeas Corpus 746

Federal habeas court had authority to hold evidentiary hearing on petitioner's claim that he received ineffective assistance of counsel in state capital murder prosecution. U.S.C.A. Const.Amend. 6.

17. Criminal Law 641.13(5)

Defendant was not prejudiced in capital murder prosecution by counsel's failure to seek competency examination, even though defendant did exhibit signs during trial of some mental health problems, absent actual basis to support claim of incompetency at time of trial.

18. Criminal Law 636(3)

Trial court did not commit error in making factual findings in defendant's absence which occurred outside presence of jury and related to legal ruling on pretrial motion; defendant's absence did not occur during "critical stage" of trial proceedings.

19. Criminal Law 641.13(2)

Defense counsel was not ineffective in failing to ensure defendant's presence at all phases of trial and failing to provide interpreter during some proceedings absent any showing that defendant would not have been convicted of capital murder if attorneys had secured his presence or provided interpreter at all times.

20. Criminal Law 339.6

To determine whether identification procedures used are constitutional, court considers whether procedures are unduly suggestive and whether identification is reliable under totality of circumstances; court considers opportunity to view, degree of attention, accuracy of description, level of certainty, and length of time elapsing between crime and identification.

21. Criminal Law 339.11(6)

Even if defendant's appearance was so different from others appearing in lineup as to be suggestive, witness' identification was reliable where witness had had excellent opportunity to view defendant for period of ten minutes, observation of defendant occurred in good lighting, witness exhibited high level of certainty, and length of time between crime and identification was brief.

22. Criminal Law 1169.2(2)

Any error in permitting showup identification in which defendant was presented to murder victim's neighbor, who had not been able to see upper portion of assailant, was harmless in light of another witness' positive identification.

23. Criminal Law 517.2(2)

To determine whether confession was given following knowing and intelligent waiver of Fifth Amendment rights, courts focus on suspects' comprehension of their rights. U.S.C.A. Const.Amend. 5.

24. Criminal Law 412.1(2), 412.2(3, 4)

Failure of police to read defendant his *Miranda* rights or to provide access to attorney after his arrest affected defendant's comprehension of his rights and not his motive in confessing, and, thus, defendant did not show that statements given after arrest were involuntary. U.S.C.A. Const.Amend. 5.

25. Criminal Law 412(4)

Translating officer's interpretation of defendant's statements, given in Spanish, after his arrest for capital murder, was trustworthy in light of evidence that officer was born in Cuba and spoke Spanish every day at home, despite defendant's contention that the officer's Spanish speaking ability was limited. U.S.C.A. Const.Amend. 5.

26. Criminal Law 1169.12

Any error in admitting statements made by defendant after his arrest for capital murder but before he was given *Miranda* rights was harmless in light of use of statements not to directly reflect guilt but to weaken his guilt phase defense. U.S.C.A. Const.Amend. 5.

27. Homicide 232

Evidence supported defendant's conviction for premeditated murder, despite his contention that victim was shot without premeditation during attempted robbery, as, under Florida law, murder committed in connection with armed robbery was premeditated.

Carolyn V. McCann, State Attorney's Office, Fort Lauderdale, Fla., for respondent-appellant, cross-appellee.

Larry H. Spalding, Billy H. Nolas, Tom Dunn, Capital Collateral Representative, Tallahassee, Fla., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge,
EDMONDSON, Circuit Judge, and

CLARK, Senior Circuit Judge.

CLARK, Senior Circuit Judge:

The state of Florida appeals the district court's grant of habeas relief to petitioner-appellee/cross-appellant Omar Blanco as to the sentencing phase of his death penalty trial. Blanco cross-appeals the district court's refusal to grant habeas relief as to the guilt/innocence phase of his trial. We affirm.

I. CIRCUMSTANCES OF THE CRIME

Blanco was sentenced to death for murder in Florida in 1982. The circumstances of the crime are set out in the Florida Supreme Court's opinion on direct appeal, which we quote in relevant part:

> Fourteen-year-old Thalia Vezos testified that at approximately 11 p.m. on January 14, 1982, she was in her bed reading at her home in Ft. Lauderdale when she saw a man standing in the hallway holding a gun and carrying a brown wallet-type object under his arm. The intruder indicated that Thalia was to keep quiet. He then cut the wires to her telephone and left the room. Thalia's uncle, John Ryan, appeared in the hall and tried to take the gun from the intruder. Ryan was shot in the scuffle and landed on top of his niece on the bed. The intruder shot Ryan six more times. The intruder then fled. Thalia ran next door to the home of the Wengatzes, where the police were called.
>
> The police arrived at the crime scene at 11:14 p.m. Office Bull went next door and spoke to Thalia, who described the intruder as a Latin

male, between 5'8" to 5'10", 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair. Officer Bull sent the description to a dispatcher at approximately 11:24 p.m. A man who lived across the street, George Abdeni, came forward with a report that he had heard shots and screaming and had seen the profile of a person in a gray jogging suit heading east from the Vezos property. This information was contained in a police BOLO that included the fact that the suspect was proceeding eastward.

The BOLO as dispatched described the suspect as a Latin make about 5'10" in height with dark complexion, black curly hair, some kind of mustache, wearing a gray or light green jogging suit, and running in an eastwardly direction. Officer Price, who was in the area, positioned his car approximately one and a half miles from the scene in a driving lane facing east on 30th Street next to North A1A to watch for someone fitting the BOLO description. At approximately 11:57 p.m. he saw appellant riding a white bicycle on the sidewalk southbound on A1A and determined that appellant fit the description on the BOLO except for his pants, which at first appeared to be heavy corduroy. He also had full facial hair. Officer Price requested more information. He then followed appellant for approximately one-tenth of a mile before stopping him. The first thing the officer noticed when he got within three to four yards of appellant was that the gray pants were the same material as the top of the sweatsuit. Officer Price requested a backup unit. Appellant replied, "No Ingles." The officer frisked appellant, but found nothing but a necklace and watch which appellant was wearing. When the backup unit arrived, the

officers handcuffed appellant and took him to the murder scene. Mr. Abdeni identified appellant as having the same profile and jogging suit as the figure he had seen earlier. Appellant was then formally arrested.

A man's purse containing appellant's ID papers and a watch belonging to Thalia Vezos was found near the door to Thalia's bedroom.

On the day following the murder, Thalia Vezos identified appellant in a line-up as the perpetrator. The Broward County Grand Jury indicted appellant on February 2, 1982, for first-degree premeditated murder and for armed burglary. Trial began on June 1, 1982, and the jury found appellant guilty on both counts. In compliance with the jury's recommended verdict, the trial judge sentenced appellant to death for the murder. He was sentenced to 75 years for the armed burglary.[1]

One additional piece of evidence linked Blanco to the crime: The state introduced evidence that Blanco's hands were covered with gunpowder residue at the time of his arrest, which was consistent with Blanco having recently fired a weapon.[2]

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1 *Blanco v. State*, 452 So.2d 520, 522-23 (Fla.1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985).

2 Trial transcript at 1241.

II. PROCEDURAL HISTORY

The Florida Supreme Court affirmed Blanco's conviction and sentence.[3] The Florida courts also denied Blanco's petitions for post-conviction relief and for habeas corpus relief.[4]

Blanco petitioned for a writ of habeas corpus in the district court, raising fifteen claims. The district court granted Blanco a new sentencing hearing because it determined that: (1) Blanco's trial counsel were ineffective during the sentencing phase because they allowed the trial court improperly to interrogate Blanco and because they revealed negative information about Blanco in response to the trial court's inquiries; (2) counsel were ineffective during sentencing because they revealed the defense strategy; and (3) the trial court improperly diminished the jury's sense of responsibility in the Florida death penalty sentencing process.[5]

We will first address the state's and Blanco's contentions that the district court erred in analyzing the facts and law surrounding the principal issue in this appeal. This unique issue simultaneously pertains to the trial court's interference with the conduct of Blanco's defense, defense counsels' ineffectiveness in response to the trial court's interference, and defense counsels' failure to present any mitigating evidence during sentencing. We will then proceed to address the state's argument that the district court erred in granting Blanco an evidentiary hearing, as well as Blanco's other arguments that the district court should have granted relief as to the guilt phase of his trial. Because we find that the district court correctly granted

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3 *See Blanco v. State*, 452 So.2d at 520.

4 *See Blanco v. Wainwright*, 507 So.2d 1377 (Fla.1987).

5 *See Blanco v. Dugger*, 691 F.Supp. 308 (S.D.Fla.1988).

Blanco a new sentencing trial due to the ineffectiveness of Blanco's counsel, we do not address any other issues relating to sentencing.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Several of Blanco's fifteen claims before the district court related to the alleged ineffectiveness of his trial counsel resulting from the actions of the trial court in questioning him, in directing his attorneys to call witnesses, and in generally controlling the conduct of the defense during portions of the guilt and sentencing phases of the trial.

Several of Blanco's fifteen claims before the district court related to the alleged ineffectiveness of his trial counsel resulting from the actions of the trial court in questioning him, in directing his attorneys to call witnesses, and in generally controlling the conduct of the defense during portions of the guilt and sentencing phases of the trial.[6] The facts underlying these claims are lengthy and complex but are necessary to a complete understanding of the interwoven issues they entail.

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6 The district court grouped these four claims under the heading of ineffective assistance of counsel. *Blanco v. Dugger*, 691 F.Supp. at 322. The district court styled these claims as follows:

> "CLAIM XI: INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING"; "CLAIM XII: TRIAL COURT'S DIRECTIONS TO BLANCO'S COUNSEL REGARDING PRESENTATION OF DEFENSE CASE"; "CLAIM XIII: TRIAL COURT'S INTERROGATION OF BLANCO AND CONCURRENT FAILURE TO WARN THAT ANSWERS ELICITED COULD BE USED IN SENTENCING AND INEFFECTIVENESS OF TRIAL COUNSEL FOR FAILING TO OBJECT"; "CLAIM XIV: TRIAL COUNSELS' DISCLOSURE OF DEFENSE STRATEGY TO COURT." *Id.* at 325-331.

A. Facts

The defense theory expressed in the opening statement was simple: Thalia Vezos was mistaken, the purse was planted by some mystery killer, and Blanco had lost his purse (which contained his identification) at least a week before the offense. After presenting two defense witnesses who testified that Blanco had lost his purse shortly before the murder, defense counsel informed the court that two other witnesses (Romero and Gonzalez) would not be called on this issue and that Blanco disagreed with the decision not to call the two witnesses. Attorney Tenbrook informed the court:

> I explained to him, or tried to explain to him through Mr. Rodriguez and the interpreter that as far as any witnesses—of course, with the exception of the defendant—it's up to the defense counsel to decide which witnesses to call and which witnesses not to call; that in my mind that is a tactical decision, and I don't have my clients telling me who to call and who not to call, with of course the exception of themselves they have an absolute right to make that decision.
>
> He's asked me to bring this to your attention. I'm not quite sure why, but I'm bringing it to your attention at this time.
>
> I'm not going to call them as along as I'm the attorney trying this case, and apparently there is a disagreement about that.[7]

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7 Trial transcript, at 1413.

The trial court thought the disputed testimony should be proffered so Blanco "can't raise it at a later time and indicate you were incompetent counsel for not calling these people...."[8]

The court asked counsel if further discussion with Blanco might be fruitful. Tenbrook responded: "Considering I can't talk directly with him, it's hard."[9] Rather than resolving the issue immediately, the trial judge told defense counsel to call other witnesses while the pertinent question was mulled over. The judge's preliminary decision was to side with counsel and not the defendant:

> I think you are right in what to do but I means—not factually—I mean as far as your right and his right, but I may even want to double check that.[10]

After another witness briefly testified, Blanco took the stand. His testimony was difficult to follow, and there were evident translation problems. After this testimony, the court and counsel held a bench conference off the record.

Following a recess, counsel returned and told the trial court in the presence of Blanco that during the recess the attorney told another lawyer in an elevator that "I had already received some condolences about the case...."[11] He was afraid jurors had heard the comments, and he wished to place the matter on the record.

The state's attorney, Satz, then raised the issue again of whether Blanco should be allowed to call witnesses. Tenbrook stated that there were only two other possible

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8 *Id.* at 1414-15.

9 *Id.* at 1415.

10 *Id.* at 1416.

11 *Id.* at 1443.

defense witnesses (Gonzalez and Romero). Tenbrook then told the court:

> Mr. Satz...feels that the law is that the defendant can require counsel to call a defense witness. I feel that calling a defense witness is a matter of personal judgment and strategy within the prerogative of defense counsel, and so long as there is a reason for not calling a witness or for calling a witness that decision is final.[12]

The trial court asked defense counsel about their conversations with their client: "Did you have additional conversation with Mr. Blanco to try to see—."[13] Defense counsel Rodriguez volunteered that "he is still of the same state of mind as far as calling them as witnesses."[14] Tenbrook then stated, "I reviewed this with my chief assistant, Bob Wills, in our office. He doesn't agree with me. He feels the defendant has the final decision on whether or not to call a witness. Respectfully, I don't. I don't...take my orders on how to try my cases from Bob Wills any more than I do from my clients."[15]

The court inquired again about whether Blanco had been informed by counsel of the detrimental effect they thought he requested testimony might have in the case. Rodriguez revealed that he had conversations with Blanco about the witnesses. Rodriguez then talked to Blanco, again, and revealed to the judge that his client had expressed to him that he was "still of the same state of mind, that is, he would

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12 *Id.* at 1446-47.

13 *Id.* at 1447.

14 *Id.*

15 *Id.* at 1448.

want these witnesses called."[16] The judge indicated that if he ruled that the defense counsel had to have the witnesses testify, he thought that there should be a record made that counsel had told their client that the testimony would be detrimental, that the client understood that, and that the client still wished to have the testimony presented.

Although the record does not reflect how the judge might have known that Blanco had taken the stand against his attorneys' advice, the court said: "I think you ought to also put on the record that he desired to take the stand over and above your recommendations. That is what you indicated before; is that right?" Rodriguez responded, "That's correct, Your Honor."[17] Apparently, counsel had told the court, off the record, that his client had taken the stand against his advice.

Satz, the state's attorney, again pushed for Blanco to be allowed to put his witnesses on the stand. The trial court opined at that point that the appropriate test was whether Blanco was competent to represent himself and waive counsel:

> THE COURT: What I'm trying to do, I'm trying to analogize this. If Mr. Blanco decided at this point that he wanted to handle the rest of the case himself—
>
> MR. SATZ: He could.
>
> THE COURT: Well, wait a minute. I think I'd have to make a determination as to whether he was competent to handle the case himself. If I decided that he was, I would probably ask these

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16 *Id.* at 1449.

17 *Id.* at 1449-50.

attorneys to continue to sit here if he had any questions for them, or to assist him at his request.

I almost put that in the same category as this. At this point I'm not—I think it might be a good rule to determine whether Mr. Blanco was competent to make this decision. I think this is what Mr. Tenbrook is saying or it sounds that way.

Already, he decided on his own decision to take the stand, which the law is clear one. He can do that whether the attorneys like it or not, but it sounds to me from what I heard it probably hurt his case a little bit and his attorneys probably feel that way, too, and it seems like the attorneys are better judges of how this case should be handled than Mr. Blanco.

MR. SATZ: I agree with that.

THE COURT: Unless it's an automatic right for him to say which witnesses he wants to call and which ones he doesn't I think I'd almost have to handle it, to determine whether he is competent to make a decision of that nature.

MR. SATZ: I don't think so. I think he has an automatic right to call the witnesses he wants to call after he's had benefit of counsel.[18]

The trial court again asked counsel about their conversations with their client. Then Blanco was brought up to the bench and the court asked whether Blanco was satisfied with his attorneys, to which he responded "regular." Blanco said he was a little angry with them earlier, but that "I'm ok

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18 *Id.* at 1453-54.

with them now."[19] The court asked what he was angry about, and Blanco responded, the "problem with the witnesses."[20] Blanco said he was concerned about the two witnesses discussed earlier, and three other witnesses who he had wanted to call. The court asked Blanco directly what additional witnesses he wanted to call, and Blanco responded that he wanted Theodoro Martinez, Barbara Lazo, and Carmen Alonso called. The court asked whether Blanco had discussed this matter with his attorneys; he responded that he had and they had indicated that they thought it would be detrimental for him to call the witnesses. He still wished for the witnesses to come. He indicated that his attorneys had not told him why the testimony would be detrimental, and the court instructed counsel to do so immediately.

The court told counsel Rodriguez to explain to Blanco why counsel believed the witnesses would be detrimental. Rodriguez mentioned that two out of three of the additional witnesses that Blanco had mentioned had been listed by defense counsel on a witness list filed the first day of trial. Rodriguez indicated that the attorneys had decided not to call these three additional witnesses; he also said he had tried to serve an additional witness, Barbara Lazo, with process, but she had moved. The court asked whether Blanco had been informed that the witnesses' testimony would be detrimental, and Rodriguez, defending himself, said that he had informed his client. Rodriguez and Blanco then spoke together in Spanish at the side of the courtroom.

Rodriguez then told the court about his discussion with his client:

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19 *Id.* at 1455.

20 *Id.*

> MR. RODRIGUEZ: Judge, he's just filed a motion, I believe, to have us withdrawn as counsel. He's upset about the situation. He's upset about the witnesses not being called and most upset, I think he is because I said that I couldn't get service on [Barbara Lazo], and he indicated to me that to his knowledge she hasn't moved and is still available.[21]

The motion was for a "change of counsel" and stated that the attorneys should withdraw because of a "conflict of interest," because the defendant was "[n]ot being represented in my best interest," and because there were "[n]o defense witnesses called in my behalf. I have informed counsel of witnesses for defense, but counsel has refused to call them." The motion also stated that "[c]ounsel does not do in court what he tells me privately he will do in court." At that point Tenbrook stated, "Your Honor, I join in on that motion. I respectfully join in on that motion."[22]

The trial court, confused by Blanco's sudden turnabout, asked Blanco why he was unhappy with his counsel, when a few moments earlier it appeared that he was "regular" happy. Blanco responded that he believed his attorneys were lying to him: "they are lying to my face. He's not telling me the truth."[23] As the discussion continued, Blanco again indicated his distrust of his attorneys and revealed his lack of understanding of the adversarial process. Blanco informed the court that defense witness Rey Alonso, who had already testified, had not lived with Blanco at the time about which Alonso had testified, and that defense counsel were lying to Blanco:

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21 *Id.* at 1459.

22 *Id.* at 1460.

23 *Id.* at 1461.

[DEFENSE INTERPRETER GONZALEZ:] [Defense counsel] have only brought a person that's lived with me three days in Hollywood to question him, but he doesn't know that much about me because he's lived in Miami Beach; that he has done a favor for Omar Barrio to stay in the apartment for three days. Those were the days that he stood in the apartment, and that's the one they want to bring in, the one that's only been living with me for two or three days.

He says I don't see this as correct. The ones that have lived with me are the ones they should bring here.

He says Rey says that he's known me for four months, that since he lived in Tyler, and he said, but four months ago I was in jail, in Dade County. He says July and through November. He says how is it possible that he can know me from December on back.

He said this is what is happening. He said they are lying to me.

THE COURT: That's his own witness. Does he understand that?

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

MR. GONZALEZ: He says no. He's not my witness.

THE COURT: Didn't he want him called?

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

MR. GONZALEZ: He said yes, to have him here, yes. They had told him that he was a witness for the State, or the police.[24]

The Rodriguez defended the attorneys:

MR. RODRIGUEZ: And you know I didn't mention him—I mentioned him as a witness in the case in our conversations. I didn't make any distinction between defense witness or State witness.

He indicated to me he wanted him called so, therefore, I called him. This is the only way I can guarantee he is going to be called. I can't guarantee Mr. Satz is going to call him.

I'm fairly sure Mr. Satz was not going to call him because he didn't list him as a State witness.[25]

Rodriguez went on to tell the court that the defense made a tactical decision not to call the witnesses Blanco wanted because their testimony was conflicting or irrelevant, and told the judge that he had discussed all this with Blanco. Defense counsel then explained his efforts to locate some of these witnesses. The state offered to help contact the witnesses, and the court ordered that the witnesses be contacted.

The court then hit upon a rather incongruous solution. Blanco could call his own witnesses based on his answer to one question: Had his attorneys told him it would be in his best interest if he himself did not testify?

THE COURT: What I'd like to know—ask Mr. Blanco one thing, and then I will make a decision

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24 *Id.* at 1463-65.

25 *Id.* at 1465.

whether he should be allowed to call whatever witnesses he wants. Tell him that.

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

THE COURT: My question is: Is it true that his attorneys advised him that they felt that it would not be in his best interest if he himself testified.

THE DEFENDANT: (Through the Interpreter) Yes, they did tell me that.

THE COURT: Did they tell him why they thought that?

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

MR. GONZALEZ: He said they only told me about Enrique and Fidel.

THE COURT: Did they tell him why they felt he should not testify?

THE DEFENDANT: (Through the Interpreter) Yes.

THE COURT: After they told him that, he made up his own mind and he decided that he wanted to testify anyway; is that true?

THE DEFENDANT: (Through his Interpreter) Yes.

THE COURT: All right. At this point then I am going to rule this way: Since Mr. Rodriguez has indicated that these witnesses do have some testimony which is beneficial to Mr. Blanco, I feel that it is incumbent upon you to accept Mr. Blanco's

position, even though it be against your wishes, to put these witnesses on.

That will be his choice, and if other detrimental evidence comes in because of these witnesses, I think that is just the way it goes.[26]

Based on this "yes" answer, the court decided that Blanco could call whatever witnesses he wanted to call. Both defense counsel again moved to withdraw:

MR. TENBROOK: ...I feel that when acting as trial counsel for someone I need to be free to exercise my own independent judgment and if my own independent judgment is going to be limited on matters of who to call and what theory to present, and these type of tactical matters, I feel that I am not rendering effective assistance of counsel and I am being reduced essentially to a walking rule one, if you will, and I'm moving to withdraw on that basis.

MR. RODRIGUEZ: I will join in that, also.

MR. TENBROOK: That will be on behalf of myself and my office.

THE COURT: I will deny the motion.[27]

The attorneys now had an order, not from a client, but from the court: "I would ask that whatever witnesses are to be presented we get them immediately...."[28] The attorneys were told to conduct direct and cross-examination as usual:

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26 *Id.* at 1467-69.

27 *Id.* at 1469. "Rule 1" was predecessor to Rule 3.850, Florida rules of Criminal Procedure, a mechanism for challenging the effectiveness of counsel.

28 Trial transcript, at 1470.

[W]hatever questions are beneficial to your client I think should be asked by you on direct.

MR. RODRIGUEZ: Can we limit Mr. Satz on his cross-examination?

THE COURT: Only within the rules of evidence.[29]

The court told counsel what to do: "I am going to ask defense counsel to contact all those witnesses, if possible...and we are just going to have to come back in the morning with whatever witnesses you can find...."[30] The discussions centered around who and where the witnesses were, and the court told the attorneys what to do with regard to attempting to locate the witnesses. For example, attorney Rodriguez said an investigator had tried to find Barbara de la Caridad Garcia, and he proceeded to read notes to the court written by an investigator to explain why the witness was not served. The court asked Blanco if he knew where she was, and decided, "Fine, we are going to let him make a call and get her up here. That's number one."[31]

Defense counsel continued to defend their actions in failing to call certain witnesses. At one point, the court asked Blanco which witnesses he wanted. When Blanco spoke in Spanish, Rodriguez interpreted that Blanco said "he doesn't want to tell me."[32] That witness was Carmen Alonso. The trial court then asked whether Blanco had read the deposition of Ms. Alonso:

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29 *Id.*

30 *Id.* at 1483.

31 *Id.* at 1472.

32 *Id.* at 1473.

MR. RODRIGUEZ: He can't read the deposition. I have to read it to him.

THE COURT: Have you ever read it to him?

MR. RODRIGUEZ: Yes, I have, Judge. I have explained to him what is in it. I have told this to him; that this is what she said in her deposition.

I have not taken the time to read, because it is a waste of time, to read it word by word. A person has to have a certain amount of trust in his attorney, that I'm not going to misrepresent to him what is in the deposition of Carmen Alonso.[33]

The court then asked Blanco whether Rodriguez had informed him of what Carmen Alonso said in the deposition. The defendant answered that he had told him she was nervous and did not wish to testify. The court then asked whether Blanco thought the attorney had told him everything that the witness had said in a deposition. Blanco responded "yes."[34]

THE COURT: All right. Is there any thing that she said that he feels would be in his best interest if she took the stand?

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

MR. GONZALEZ: He says I just want to tell you one thing before I answer that question.

THE COURT: Go ahead.

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33 *Id.* at 1476.

34 *Id.* at 1477.

(Thereupon, Mr. Gonzalez and Mr. Blanco conversed in Spanish.)

MR. GONZALEZ: He says nobody can do me any harm up there whether it's against or for me. The only reason I want them to come here to talk is so that you can hear them and find out what motive and why they are lying, and that's why I want them to come here.

He says since they are lying, and if the lawyers could have done a good job, that they would have brought papers showing that he rented in 1980 and 1981 from the managers, and that would have proven that he has no relationship with them, that the one that has relationship with them is Rey Alonso, and the different areas that he has lived with them, and with Enrique Gonzalez, and Enrique Gonzalez, according to what Mr. Rodriguez told me, that he is lying, that he has lived with...him and Rey Alonso, in Hollywood.

He told him that he didn't know the address exactly, but that he did know the location and the name, but that one of the addresses he had found, where he had lived in May 1981 with Rey Alonso, with Enrique Gonzalez, and with Carmen, and with Carmen, the wife, in Hollywood—because Rey Alonso is lying.

Why is it they don't want to bring them all here to hear them, to see if they are telling the truth or to see if I'm lying.

THE COURT: Tell him I want to explain something to him about the rules of a trial which I don't think he understands.

> The rules are if you call a witness, you don't call him to show that they are lying, because if call a witness you vouch for their truth.
>
> (Thereupon, Mr. Gonzalez spoke in Spanish.)
>
> THE COURT: And so he's not going to be able to call Rey Alonso. He could call other witnesses to show Rey Alonso is lying, but he can't call Rey Alonso as his witness and be hostile to him.[35]

Despite the judge's explanations, Blanco insisted that he "didn't call Rey Alonso" and that Rey Alonso is "lying."[36]

Blanco said that his lawyer had said that Rey Alonso was a state witness, and then Rodriguez disputed his client's word, defended himself, and added:

> MR. RODRIGUEZ: Judge, I really have no recollection whatsoever of telling [my client] that Rey Alonso was a State witness, and I did not really think it was any type of misunderstanding; that if he was to be called he had to be called by us as part of our case, and my client indicated that he wanted him called and put on the stand, as he did here in open court a few months ago, and I cannot require Mr. Satz to call him as a witness.[37]

The court quizzed Blanco about whether that was true or not.

Blanco then told the court that he believed Rey Alonso had committed the murder, and that he wanted Rey Alonso to testify about that matter. After discussing that with him for a while, the judge told Blanco to be seated. Defense attorney

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35 *Id.* at 1477-79.

36 *Id.* at 1479-82.

37 *Id.* at 1480.

Rodriguez asked the interpreter on the record what his client had just said:

MR. RODRIGUEZ: What did he just say?

MR. GONZALEZ: He said he doesn't want any of them as his lawyers.

THE COURT: Tell him—just have a seat a minute. Maybe be wants you to call Rey Alonso and ask Rey Alonso if he perpetrated this crime.

MR. RODRIGUEZ: Judge, if I thought that Rey Alonso was going to admit it, I would have asked him that question.

THE COURT: At this point, I am going to deny the motion to withdraw, as I previously stated.

MR. TENBROOK: He is ours?

THE COURT: Yours. I am going to deny Mr. Blanco's request to have you withdrawn.

So far, as far as I'm concerned, I feel that Mr. Blanco has had competent counsel.

However, I am going to rule that, as I previously stated, that Mr. Blanco has a right to call these witnesses as long as they have some evidence to present to the jury which may be beneficial to his case and corroborate other evidence which may be involved in the case, even though there may be some evidence which may be detrimental.

I think he has a right to have those witnesses called, so I am going to ask defense counsel to contact all those witnesses, if possible.

Mr. Blanco will have to have an arrangement to make a phone call to Barbara—what was her name?

MR. SATZ: Lazo.

THE COURT: Barbara Lazo or through Rey Alonso to try to locate her and also, Mr. Rodriguez, I'd ask if you could try to find her.

What will we do—there are other witnesses we can call, Romero and Gonzalez, this afternoon, and try to get these other witnesses. That's all we can do.[38]

Fidel Romero entered the courtroom from jail to testify as per the court's instructions. Defense counsel had not reviewed the witness' deposition, since he had not intended to call him, so he asked for a few moments to go over the deposition. They stood in a corner of the courtroom and talked. Then Tenbrook informed the court that his client had just told him that he also wished to call his brother, Rodolfo Blanco, as a witness. The trial court asked if that was correct and petitioner responded that it was.

The trial court then had defense counsel call Fidel Romero and Enrique Gonzalez to testify. After their testimony, the court instructed Rodriguez to try to get the three or four more witnesses that Blanco desired. The court instructed petitioner to make similar efforts from jail. At this point, defense attorney Tenbrook mentioned that he was "fortunate" not to be able to speak Spanish, so he would not have to communicate with his client overnight as Blanco was trying to locate witnesses.

The court wished to have a charge conference. Rodriguez left, stating: "Tenbrook will handle the charge conference. I

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38 *Id.* at 1482-83.

will take charge of the investigating."[39] Blanco thanked the judge.

The next morning court resumed. The judge asked for a report from Rodriguez regarding his attempts to find the witnesses the court had ordered him to find. Rodriguez said that he had spoken with his client's brother directly and had asked him to come to court:

> MR. RODRIGUEZ: And I told him that I needed him to be here this morning, at 8:30 a.m.; here being the Broward County Courthouse.
>
> I said to be in Room 740, which is my office, at 8:30 this morning. He indicated to me that his wife was in the hospital. I have no way of verifying whether she was or not. I have some doubt that she really was in the hospital.
>
> I asked him—I said to him, "Look, your brother is on trial for his life. He needs you to be there. He needs you to be there as a witness on some background information which is really what his testimony would entail, and he said 'I'll be there.'"
>
> Then I pointed out to him that there were several other people that I was trying to get ahold of and have here as witnesses in this case. I asked him if he knew them. He said he did.
>
> I asked him to try to round them up and they could all come to my office, in Room 740, at 8:30. I told him I was trying to locate Barbarita Lazo.
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> THE COURT: Barbara Lazo.
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> MR. RODRIGUEZ: Carmen Alonso.

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39 *Id.* at 1528.

THE COURT: Carmen Alonso.

MR. RODRIGUEZ: And Theodoro Martinez.

THE COURT: Theodoro Martinez. All right, and you told him to try to locate them, also?

MR. RODRIGUEZ: Right. That's correct.

THE COURT: That is the last time you talked to him?

MR. RODRIGUEZ: That's correct.

THE COURT: Have you tried to call his home this morning to see if he is there?

MR. RODRIGUEZ: Judge, I have not tried this morning; no.

THE COURT: I don't understand why—what about Barbarita Lazo?[40]

Rodriguez then discussed his efforts to reach Barbarita Lazo. He said he telephoned her home and spoke with her mother, leaving the message that she had been subpoenaed.

> I said, "I'm an attorney up here in Broward County. I'm in the middle of a trail and I need her to come as a defense witness...."[41]

Counsel then stated that Blanco had also reached Lazo's mother. Rodriguez stated that he had telephoned German Berrios, a witness from the previous day, to "have him try to round up these people."[42] Berrios was not home, and Rodriguez "left a message for Mr. Berrios to try to round up

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40 *Id.* at 1617-18.

41 *Id.* at 1618-19.

42 *Id.* at 1619.

these same people. I gave him the list of the names and to have them here at 8:30."[43]

Rodriguez further stated that he called a person who knew Theodoro Martinez, and told him to get Martinez to court before 8:30. The court then ordered Rodriguez to try harder, because Rodriguez had not called the witnesses that morning. The court "want[ed] it done right now."[44] After Rodriguez exited, the trial judge spoke with the state's attorney regarding which witnesses would be called in rebuttal. When that discussion concluded defense counsel Tenbrook decided to relate to the court what he and his client had been discussing:

> MR. TENBROOK: Judge, I was just speaking with Mr. Blanco about his efforts to contact the witnesses, and apparently he contacted basically the same people that Mr. Rodriguez did but in addition—
>
> THE COURT: Could we have Mr. Blanco state through his interpreter which persons he did call and what efforts he did make.
>
> MR. TENBROOK: Sure, Judge. I think that would be best. You want to tell the judge.[45]

The judge proceeded to quiz Blanco about his jail cell efforts to get witnesses to court. Blanco stated that he tried to reach his brother but he couldn't communicate with him because no one was there. He indicated that he tried to reach him at his brother's mother-in-law's house, but she would not accept the collect phone call, saying "that long distance

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43 *Id.*

44 *Id.* at 1620.

45 *Id.* at 1621-22.

phone calls cost a lot."[46] There were further discussions about other witnesses Blanco had difficulty in contacting by collect call from the jail. The trial court repeatedly quizzed Blanco about his efforts to get witnesses into court. One witness told Blanco that he needed someone official to tell him he had to come, from which the court concluded: "In other words, he wouldn't come voluntarily; is that it?"[47] Blanco then explained that he had learned overnight that one witness had moved to another state. Rodriguez then returned to the courtroom, and the trial court asked him about his luck since he had left. He explained his efforts to contact witnesses, volunteering that when he called one witnesses' home he "didn't want to say Omar Blanco. If they are trying to avoid service, I thought there would be a problem."[48]

The state then told the court that there had been plenty of opportunities to subpoena people needed by the defense, inasmuch as it was June, the case had been pending since January, and had already been continued once. According to the state, "[t]he defendant has had every opportunity to get his witnesses here."[49]

The trial court proceeded to ask Blanco about what he thought his witnesses would testify to if they were brought to court. Blanco proffered that Barbara Lazo would testify about how long he had known Rey Alonso. He also said that he would prove through Lazo that Rey Alonso was lying. He was going to prove that through Carmen Alonso as well. His brother would testify about how Blanco looked in January, and whether Blanco had his "bag" then. The court then

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46 *Id.* at 1623.

47 *Id.* at 1624.

48 *Id.* at 1629.

49 *Id.* at 1632.

commented: "[I]t seems to me as though there's been substantial effort to raise these people."[50] The trial court asked defense counsel why they did not wish to call the witnesses, and both defense counsel explained to the court why they thought the testimony would be detrimental. The trial court continued to ask defense counsel about their conversations with their client regarding what their client had indicated the witnesses would provide. For instance, the judge asked Rodriguez what Theodoro Martinez would provide, and Rodriguez indicated that "[w]ell, [Blanco] told me that [Martinez] knew him when he came to this country and that type of information that he told you here today, but as far as anything that would, that I felt would help him in his case, I really haven't had any discussions with him pertaining to that, or he hasn't conveyed any information to me pertaining to that. We have discussed Theodoro Martinez."[51]

The Court, after one overnight recess to locate witnesses, decided:

> Well, at this time then I'm going to find that substantial efforts have been made to reach these people. It seems to me that none of these people, including his own brother, wishes to cooperate with him, and it seems like nobody wants anything to do with supporting him in his defense.
>
> It seems like every persons was contacted, including being directly contacted by Mr. Blanco himself. He's asked for their help and they would not come.
>
> At this point, from what's been stated, anyway, I think if they did testify as to what Mr. Blanco

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50 *Id.* at 1639.

51 *Id.* at 1643.

said, I think it would probably be cumulative. I think those items have already been brought out by the defense. They already know that there is an issue to that effect, and at this time I am ready to go forward.

If you have any further witnesses, you can present them. If not, you can rest.

Let the court record reflect that it is 11:00 o'clock. The case was called for 9:30. These witnesses were discussed yesterday afternoon, all afternoon, about Mr. Blanco's dissatisfaction with his counsel, and all this was brought up in the general area of, say, 3 o'clock, and there's been opportunity to locate these people and they are not here. So I am ready to go forward.[52]

Thus, the judge concluded that no one wanted anything to do with Blanco, including his brother, and they would not help him despite his requests. Tenbrook then volunteered that Martinez had said something disparaging to the press about Blanco, so he would not be a witness. After this discussion, the state asked the court whether subpoenas should be issued for these people. The court responded, "I don't know. It's too late now. I'm going forward with the case."[53] Defense counsel said he did not care if the subpoenas went out, because he did not want to call the witnesses anyway. The court indicated that the subpoenas should have gone out the day before, and again stressed, "[I]t seems like no one wishes to cooperate with Mr. Blanco. They don't want to come in here in defense, and I think that is important to say, because I think that if they are forced

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52 *Id.* at 1643-44.

53 *Id.* at 1646.

in they possibly may be detrimental to him and may be hostile, so I don't know what benefit they would be to him."[54]

The jury returned a general verdict of guilty of first degree murder and armed burglary. At that point, defense attorney Rodriguez had the following discussion with the court:

> MR. RODRIGUEZ: Judge, at this time I would ask the Court what the Court is considering as far as the penalty phase, the time on it.
>
> THE COURT: I'm ready to go forward. I told you whatever witnesses you had to have available.
>
> MR. RODRIGUEZ: Judge, I have one witness available at this time. I would request more time to prepare and equip me for the penalty phase.
>
> Specifically, what I need to prepare is the psychiatric testimony of a Court-appointed psychiatrist.
>
> THE COURT: Where is he?
>
> MR. RODRIGUEZ: We don't have a Court-appointed psychiatrist only for the purpose of the penalty phase.
>
> In addition to that, I would try to get Omar Blanco's brother up here. His brother has not appeared here today and I would like the opportunity to—
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> THE COURT: I'm sorry. I'm not going to discharge this jury. I want to go forward. I told you all. You all knew what may happen. You all knew there was a good chance a verdict of this nature would be rendered.

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54 *Id.* at 1647.

I told you all to be ready.[55]

After the state indicated there was no objection to any delay, the trial court decided to continue the sentencing hearing until the next Tuesday, four days away. The jury was informed that "it's been indicated to me that there may be some evidence that the defense wishes to present in connection with that second phase in the proceedings involving some people who might not be available at this minute...."[56] The court continued, "[I]t may take some time to find these people, maybe a day or so."[57] The trial court told the jurors that the proceedings would be postponed "until some of these witnesses can be located and requested to appear."[58]

After the jury agreed that the continuance would not inconvenience them, the trial court again told them "there may be some evidence presented, and I'm sure there will be evidence presented for you to consider."[59] The trial court told the jurors that the sentencing hearing "could be an hour or two hours."[60] Tenbrook then indicated that he had a trial on Monday, the day before the rescheduled sentencing hearing, and that he might be unable to attend a scheduled sentencing charge conference that day. Before adjourning, the court told Rodriguez to spend Saturday, Sunday and Monday "get[ing] all the information you will need from Mr. Blanco as to who he wishes for you to contact to present in

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55 *Id.* at 1752-53.

56 *Id.* at 1759.

57 *Id.*

58 *Id.*

59 *Id.* at 1761.

60 *Id.* at 1762.

connection with the sentencing phase."[61] Then, the judge had the defense attorney quiz Blanco, and translate:

> Mr. Rodriguez, would you tell Mr. Blanco the reason why you requested that the sentencing phase be postponed so that he understands it, and if he has any comments to it he can make them at this point.
>
> MR. RODRIGUEZ: Judge, I have already advised him why I asked for a continuance on it and I will keep discussing it with him and see if he has any comment.
>
> THE COURT: What I mean does he have any comment about not having it now as opposed to next week?
>
> (Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)
>
> THE COURT: Mr. Rodriguez, do you have a comment as to my question? Does he have any comment to make about the fact that you did tell him why you postponed it?
>
> MR. RODRIGUEZ: That's right. I explained it to him.
>
> THE COURT: Did he seem to have any objection to that?
>
> MR. RODRIGUEZ: No, Judge. He seemed to say leave it up to the lawyers. That is basically what he said at this point.[62]

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61 *Id.* at 1764.

62 *Id.* at 1764-65.

The next Monday evening, Tenbrook did not appear at the charge conference, but Rodriguez did. He was there with Blanco, but no interpreter was present. Since Rodriguez was talking, there was no translator. At this sentencing charge conference, defense counsel again made a statement regarding communications he had had with his client. Specifically, the trial court turned to Rodriguez and asked him directly what evidence he intended to present at the sentencing hearing. Rodriguez readily responded.

He stated that he had spoken with his client about calling additional witnesses, specifically his client's brother. He then stated, "I don't believe he wants to do that." Rodriguez also said, "I don't believe his brother wants to come up here."[63] The trial court immediately said, "Can we get all of this on the record?"[64]

The trial court (at the state's suggestion) had the defendant stand before the court and answer questions through his own attorney regarding who he wished to help him at sentencing. Rodriguez was the interpreter:

> THE COURT: ...I'd like at this point for you to tell him who you thought might be in his best interest to be called, and what you thought they might say, and why you wanted to call them.
>
> This I want in open court here, and I want you to get a response from him as to whether he wants these people. I want all this on the record, or whether he doesn't, and I want, you know—
>
> MR. SATZ: Why don't you do it this way? Why don't you ask him to come up here, Carlos, and then you ask him and interpret. Why don't you tell

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63 *Id.* at 1780.

64 *Id.* at 1781.

him and then relate in the record what you told him and then—

MR. RODRIGUEZ: I asked him if he wanted his brother to come here tomorrow to testify in his behalf and he's indicated that he doesn't. Your Honor.

THE COURT: He doesn't?

MR. RODRIGUEZ: Let me talk to him a little bit about why I was thinking of calling him.

THE COURT: Tell him first it's his decision so he doesn't get mad at you, but tell him for the record you are putting down why you thought it might be in his best interest, but again it will be his final decision.

MR. RODRIGUEZ: All right.

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: I have explained to him, Judge, that the reason that I was thinking of calling his brother is to verify his family ties; the fact that he left some of his family in Cuba when he left; the type of strain; the type of emotional state he might have been in because of that, and also tell a little about his background, that kind of thing.

He's indicated he doesn't want me to call his brother as a witness.

THE COURT: Who else did you figure you might call?

MR. RODRIGUEZ: Judge, I had Dr. Curtis under subpoena for tomorrow morning. I am not planning on calling him.

THE COURT: What was he to say?

MR. RODRIGUEZ: Judge, he is the linguistics expert on Spanish and English translation, but he is also a cultural expert. That is part of his studies. He studies the Latin cultures and I was contemplating whether I could call him to show some type of cultural shock or mitigating circumstance along those lines.

I really do not anticipate calling him as a witness at this point because I don't think I can establish that. I think it's the type of argument that would be ridiculed. Certainly, it would be ridiculed by the State and perhaps by the jury simply because what, in effect, I would be arguing is that it is a cultural shock that has caused Mr. Blanco to be under extreme duress, that would cause him to kill somebody, and I just don't think that argument holds any merit, having reviewed it and looked at it.

THE COURT: Mr. Blanco says he didn't kill anybody so what good would that do? He's never told the man he killed anybody.

MR. RODRIGUEZ: That's correct.

THE COURT: So what kind of argument would that be?

MR. RODRIGUEZ: It wouldn't be much of an argument. That's why I don't anticipate calling him.

THE COURT: Have you told Mr. Blanco you considered it and that you decided it would be a waste of time?

MR. RODRIGUEZ: I've told him. I'd just like to have a moment to explain why I'm not going to call him.

THE COURT: Ask him what his preference would be as to it?

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: Judge, he understands and he says he didn't want to call anybody so—

THE COURT: Is there any other people that you suggested to him that might be able to invoke some type of reasoning from the jury where they might not—where they may feel it would be in his best interest?

MR. RODRIGUEZ: Judge, we had discussed a psychiatrist and if I may just have a moment to discuss that with him.

(Thereupon Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: Judge, he is in agreement with me on this issue and we have discussed the possibility of calling a psychiatrist, and I just don't think it's a matter where he has any type of—he certainly does not have a competency problem, and he certainly does not have an insanity problem, and I've seen no evidence of any type of emotional duress that would constitute a mitigating factor in this case.

Frankly, I just don't think it would aid matters at all to call a psychiatrist and he is in agreement with me.

THE COURT: What about members of his family besides his brother? Does he have any here? Friends?

MR. RODRIGUEZ: His sponsor.

THE COURT: His sponsor, Rey Alonso?

MR. SATZ: Anybody, anybody?

THE COURT: Mrs. Alonso.

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. SATZ: He doesn't?

MR. RODRIGUEZ: Nada means nobody.

THE COURT: So he doesn't want to present any people to come up here and testify in his behalf regarding this phase of the proceedings?

MR. RODRIGUEZ? That's what he just stated, Your Honor.

THE COURT: You have explained to him the nature of the phase and what he might be able to present?

MR. RODRIGUEZ: That's right. I have explained to him what we are proceeding on and what I'm trying to show or possibly show through these witnesses.

The only one that I would be wanting to call would be possibly his brother and his brother, as I said, has shown a complete total disregard for Mr. Blanco insofar as wanting to appear here or appearing here, and I just don't think that type of

attitude or that type of testimony is going to be beneficial to him at all.

Certainly, I could have his brother arrested if we had service on him and brought in here, but that is not going to do any good as far as any type of mitigating circumstances or background, or anything else.

* * *

THE COURT: Have you called his brother about this phase?

MR. RODRIGUEZ: I explained to him both phases when I called him on Friday, and I explained to him I might want him to appear, not only for the trial part but if it went into a sentencing phase, for the sentencing phase, and he indicated his willingness, but yet he hasn't contacted me. He hasn't appeared.

In an abundance of caution, I sent another subpoena out there. According to Norman Ouslander, one of our investigators, it was taken to the address where Rodolfo Blanco lived and given to his family.

Rodolfo was not there but he left it there with his family and he went through an explanation, explained to them what we were doing and served him with a subpoena for tomorrow.

Even if he did show up tomorrow, which I seriously doubt—

THE COURT: You won't call him?

MR. RODRIGUEZ: I don't think we will call him.

THE COURT: If he does how up, I'd like you again to ask Mr. Blanco if he wants his brother to testify, if he does show.

MR. RODRIGUEZ: I will, Judge.

THE SATZ: He doesn't want anybody?

MR. RODRIGUEZ: That is exactly what I asked him. He said, "Nada."

MR. SATZ: Did you tell him he has a right to testify?

THE COURT: How about him?

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: Judge, I have explained to him he has a right to be a witness and the preliminary indication I just got from him is that he does not want to be a witness.

THE COURT: He does not want to say anything in his own behalf?

MR. RODRIGUEZ: That is exactly what he indicated?

THE COURT: Tell him if he changes his mind between now and tomorrow morning, that he can still speak in his own behalf if he'd like to.

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: He says he explained himself on the stand and they found him guilty and he really doesn't have much else to say.

THE COURT: Tell him he doesn't have to discuss the case itself.

At this phase he can say something about himself, who he is, and his background, and if he wants to himself he can ask the jury to recommend life imprisonment if he wants to.

Explain that he doesn't have to go over the case again.

(Thereupon, Mr. Rodriguez and Mr. Blanco conversed in Spanish.)

MR. RODRIGUEZ: Judge, he says he indicated—I explained to him what you just wanted me to explain to him as far as this phase and not having to review the case, or anything along those lines, and he indicated that he didn't really care what they recommended.

THE COURT: All right, Tell him he can have a seat again.

MR. RODRIGUEZ: Okay.[65]

The next morning, June 15, 1982, the sentencing hearing was held. The state introduced evidence of a prior armed burglary conviction, and the defense offered no evidence. The trial court once again asked the defendant whether he wished to testify, and he said that he did not. The court then asked Rodriguez whether anyone had contacted him about speaking in Blanco's behalf, and he said no.

Following closing arguments and the judge's charge, the jury retired to deliberate. The jury returned with their

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65 *Id.* at 1781-89.

recommendation in fifteen minutes, voting eight to four in favor of the death penalty.[66]

A week later, the trial court imposed the death sentence. The trial found four statutory aggravating circumstances (two of which were reversed on appeal) and found no mitigating circumstances.[67]

B. Guilt Phase Errors

Blanco's guilt phase claims arising out of the above-recited facts relate to whether he received effective assistance of counsel. Although Blanco contends at times that he was denied altogether the assistance of counsel, our interpretation of the interaction between the trial court, the attorneys, and Blanco indicates that Blanco had the advice of counsel at all times but that Blanco at one point was allowed by the trial court to make decisions traditionally reserved for counsel.[68]

1. Actual Prejudice

[1] We have examined whether Blanco suffered actual prejudice during the guilt phase of the trial without first attempting to analyze the precise errors that might have

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66 *Id.* at 1848.

67 *See Blanco v. State*, 452 So.2d at 525-26.

68 *See Crutchfield v. Wainwright*, 803 F.2d 1103, 1108 (11th Cir.1986)(en banc)(contrasting claim of ineffective assistance of counsel with claim of denial of assistance of counsel), *cert. denied*, 483 U.S. 1008, 107 S.Ct. 3235, 97 L.Ed.2d 740 (1987).

been made by counsel.[69] The Supreme Court has described the appropriate inquiry in an assessment of prejudice stemming from ineffective assistance of counsel during a guilt phase trial:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.[70]

Under this standard, we conclude that the trial court's actions and defense counsels' responses did not prejudice Blanco during the guilt phase of his death penalty trial. While attempting to be helpful to Blanco the trial court overreached its authority and infringed upon the relationship between Blanco and his attorneys by requiring defense counsel to call two additional witnesses. Generally, trial tactics are for defense counsel to formulate.[71] The decision

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69 *See Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

70 *Id.*, 466 U.S. at 695, 104 S.ct. at 2068-69.

71 *See Coco v. United States*, 569 F.2d 367, 371 (5th Cir.1978)(" 'A lawyer must be able to determine questions of strategy during trial, and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right to effective assistance of counsel, his decision regarding trial strategy must be binding.' " [quoting *United States ex rel Cruz v. LaVallee*, 448 F.2d 671, (2d Cir.19710)]).

as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel.[72]

Yet the only impact that trial court's actions had during the guilt phase of the trial was to cause two witnesses, Gonzalez and Romero, to be called. The extensive colloquy discussed above was out of the hearing of the jury and so did not have an effect upon their verdict. The testimony of these two witnesses was essentially in accordance with that presented by the two defense witnesses already called by Blanco's attorneys on the issue of Blanco's purse, which Blanco claimed was left at the murder scene by someone else. Two previous witnesses had testified that Blanco lost his purse and identification papers shortly before the offense.[73] Gonzalez and Romero also testified that Blanco had lost his purse in the period of time preceding the murder.[74] The additional testimony was thus essentially cumulative and supportive of Blanco's defensive theory.

Blanco argues that he was prejudiced because, although the first two purse witnesses did not have criminal records, both Gonzalez and Romero previously had been charged

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72 *See Tosh v. Lockhart*, 879 F.2d 412, 414 (8th Cir.1989)("[T]he decision not to use alibi testimony may reflect the reasonable exercise of judgment in view of the attorney's concern that the testimony would be conflicting...or otherwise unfavorable." (citations omitted)); *United States v. Miller*, 643 F.2d 713, 714 (10th Cir.1981)("Whether to call a particular witness is a tactical decision and, thus, a 'matter of discretion' for trial counsel." (citation omitted)); *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978)("the presentation of testimonial evidence is a matter of trial strategy"); *O'Malley v. United States*, 285 F.2d 733, 734 (6th Cir.1961)("Counsel's decision not to subpoena or use certain witnesses is often a matter addressed to the judgment of the trial attorney." (citation omitted)); *cf. Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(holding that defendant has no right to determine which nonfrivolous issues appointed counsel would press on appeal).

73 Trial transcript, at 1316-50.

74 *Id.* at 1504 (Romero); *Id.* at 1511 (Gonzalez).

with crimes. And, the prosecution emphasized this fact during closing argument.[75] However, the district court determined (and we agree) that "[i]n light of all the testimony presented, especially that offered by [the state] in its case-in-chief, the evidence so overwhelmingly established Blanco's guilt that any contradiction presented by these two witnesses had a *de minimis* impact upon the guilt-innocence portion of Blanco's trial."[76] As the Florida Supreme Court's above-quoted summary of the facts reveals, Blanco's guilt was clearly established by the state. Thalia Vezos observed Blanco for several minutes in her room immediately prior to the murder. Blanco was arrested shortly after the murder while riding a bicycle one and one-half miles from the murder scene. A neighbor saw a figure leaving the murder scene dressed in clothes like those Blanco was wearing when arrested. Blanco's purse and identification appears were found at the scene of the crime. Also, gunpowder residue was found on the back of Blanco's hands, indicating that he had recently fired a weapon.[77]

Omitting the testimony of the two additional witnesses that the trial court caused to be called does not create a "reasonable probability" that "the factfinder would have had a reasonable doubt respecting guilt." The strength of the evidence against Blanco makes it extremely unlikely that the jury would have had a reasonable doubt about Blanco's guilt. Blanco's argument that the jury might have had such a reasonable doubt if Gonzalez and Romero had not testified does not fill the large hold in Blanco's trial defense: Even if the jury had believed the testimony of the first two witnesses, the fact that Blanco lost his purse shortly before the

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75 *See id.* at 1686-87.

76 *Blanco v. Dugger,* 691 F.Supp. at 329.

77 Trial transcript, at 1241.

murder does not necessarily show that Blanco did not find his purse prior to the murder. And the state impeached Blanco's statements at trail that he had lost his purse prior to the murder by introducing the testimony of an interrogating officer to the effect that Blanco stated after his arrest that his identification papers were at his apartment.

2. Presumed Prejudice

Blanco additionally argues that prejudice should be presumed due to the trial court's interference. The Supreme Court held in *Washington* that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance."[78] "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[79] In *United States v. Cronic,*[80] the Supreme held that prejudice sometimes may be presumed "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[81] Moreover, "The Court has uniformly found constitutional error without a showing of prejudice

78 *Washington*, 466 U.S. at 692, 104 S.Ct. at 2067 (citation omitted).

79 *Id.*, 466 U.S. 686, 104 S.Ct. at 2063 (*citing to, inter alia, Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)(bar on attorney-client consultation overnight recess)).

80 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

81 *Id.*, 466 U.S. at 659-660, 104 S.Ct. at 2047.

when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."[82]

This circuit has interpreted the Supreme Court's opinions concerning presumptions of prejudice in ineffective assistance counsel claims. We have held,

> [E]xceptions to the [*Washington*] [prejudice] standard are appropriate only when the circumstances would offend basic concepts of due process. When such prejudicial circumstances exist, the concern is with procedural fair trial requirements, and not with whether the defendant would have been found guilty.[83]

We have also held,

> In *Cronic,* the Court carved out a narrow exception to *Washington's* general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Circumstances which would warrant a presumption of prejudice from counsel's ineffectiveness are those where "the adversary process itself is [rendered] presumptively unreliable [by the circumstances].[84]

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82 *Id.,* 466 U.S. at 659 n. 25, 104 S.Ct. at 2047 n. 25 (citations omitted).

83 *Stano v. Dugger,* 921 F.2d 1125, 1154 (11th Cir.1991) (en banc).

84 *Chadwick v. Green,* 740 F.2d 897, 900 (11th Cir.1984) (citations and footnote omitted); *see also Smith v. Wainwright,* 777 F.2d 609, 620 (11th Cir.1985) ("[T]he burden of proof under Cronic is a very heavy one."), *cert. denied* 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565 (1986).

[2] This case does not involve circumstances appropriate for a presumption of prejudice. While the trial court did interfere with the conduct of the defense during the guilt phase to some degree, this interference was not great, and the particular prejudice flowing from it is easily discernible and therefore not costly to litigate.[85] The interference amounted to countermanding the attorneys' strategic decision not to call two witnesses, nothing more. Blanco's attorneys were not otherwise hampered in their conduct of the guilt phase defense. Blanco's attorneys examined the witnesses on the stand. And Blanco was not prevented from consulting with his attorneys for any period of time. "Basic concepts of due process" were not offended by the trial court's actions. We refuse Blanco's invitation to presume prejudice.

[3,4] As part of his claim that guilt phase prejudice should be presumed as a result of that trial court's intervention, Blanco makes the additional argument that the trial court essentially allowed Blanco to represent himself but failed to

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85 *See Stano*, 921 F.2d at 1171 (Tjoflat, C.J., & Johnson, J., dissenting)("An obvious rationale supports this per se [presumption of prejudice in certain cases implicating the right to assistance of counsel]: given the actual or constructive denial of counsel at a critical stage, it is practically impossible to conduct a prejudice inquiry in collateral proceeding."); *cf. Arizona v. Fulminante*, ___ U.S. ___, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991)(Rehnquist, C.J., & O'Connor, Scalia, Kennedy, & Souter, JJ.)(discussing cases in which harmless error analysis is appropriate; "The common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.").

conduct an inquiry under *Faretta v. California.*[86] The district court found that Blanco never indicated a desire to represent himself and simply asked for a change of counsel, which request was denied.[87] Blanco is correct that he in effect represented himself as to the single decision to call the two additional defense witnesses. But this brief lapse in representation by counsel does not constitute a total absence of counsel or prohibition from providing assistance such that a presumption of prejudice is appropriate.[88] During Blanco's limited period of self-representation, his attorneys advised him as to the reasons they did not think the two additional witnesses should be called.[89] Blanco thus did have the advice of counsel in making his decision to call Gonzalez and Romero, even if he chose not to follow it.[90]

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86 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); *see e.g., Cross v. United States,* 893 F.2d 1287, 1290 (11th Cir.)("A trial court's evaluation of an individual's desire to represent himself is fraught with the possibility of error. Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se—and thereby depriving the individual of his right to counsel—or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta.*" (citations omitted)), *cert. denied,* ___ U.S. ___, 111 S.Ct. 138, 112 L.Ed.2d 105 (1990). *See generally Strozier v. Newsome,* 926 F.2d 1100, 1105 (11th Cir.1991)(waiver of trial counsel permissible even if trial court does not conduct competency hearing).

87 *Blanco v. Dugger,* 691 F.Supp. at 328 n. 16.

88 *Cf. Jackson v. James,* 839 F.2d 1513 (11th Cir.1988)(appellant deprived of right to counsel when he was required to represent himself through voir dire, opening statements, and testimony of eight or nine witnesses); *Harding v. Davis,* 878 F.2d 1341, 1344 (11th Cir.1989)(presuming prejudice in case in which attorney "did nothing to fulfill the obligations of his position as counsel").

89 Trial transcript, at 1456-57.

90 *Cf. United States v. Mills,* 704 F.2d 1553, 1557 (11th Cir.1983) (self-representation where counsel continues to act in advisory role permissible in federal court in discretion of trial court), *cert. denied,* 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984).

[5] Both parties contend that the district court "in effect" found that an actual conflict of interest existed.[91] There is a limited presumption of prejudice in conflict of counsel cases.[92] However, we do not analyze this case in terms of conflict of interest, because the alleged conflict was only between the lawyers' duties to the court and their duties to their client. Attorneys, as officers of the court, could be said to have such a conflict in practically every case involving ineffective assistance. Just because Blanco's counsel acquiesced in and did not object to the trial court's interference does not show that they "actively represented conflicting interests."[93] We therefore reject Blanco's argument that prejudice should be presumed because of a conflict of interest. We accordingly affirm the district court's refusal to grant habeas corpus relief due to the trial court's interference and counsels' ineffectiveness during the guilt phase of Blanco's trial.

C. Penalty Phase Errors

The district court granted habeas relief to Blanco on claims arising out of several aspects of the interaction between trial court and defense counsel that impinged upon Blanco's sentencing hearing. The district court ordered resentencing because Blanco's attorneys were ineffective in allowing the trial court—the ultimate sentencer—to interrogate Blanco without objection as to prejudicial information.[94] The district court also based relief on defense counsels' ineffectiveness in disclosing the defense strategy

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91 *See Blanco v. Dugger,* 691 F.Supp at 331.

92 *See Washington,* 466 U.S. at 697, 104 S.Ct. at 2067.

93 *Id.* (internal quotations omitted).

94 *Blanco v. Dugger.* 691 F.Supp. at 329-331.

to the trial court.[95] But the district court rejected Blanco's complaint that his trial counsel were ineffective for failing to present mitigating evidence during the sentencing proceedings.[96] We find that, due to the trial court's intervention and other factors, Blanco's attorneys were generally ineffective during the sentencing phase of the trial.

1. Procedural Default

The state argues that Blanco's claims relating to (1) defense counsels' failure to prevent the trial court from interrogating Blanco and (2) defense counsels' revelation of strategy are procedurally defaulted, because these claims were presented for the first time in Blanco's claim of ineffectiveness concerning the presentation of mitigating evidence. The state cites to the Florida Supreme Court's refusal to consider claim (1) on Blanco's collateral appeal.[97] However, the Florida Supreme Court did not refuse to consider the *ineffectiveness* aspect of this claim on collateral review, but only the substantive aspect of this claim, which it found to have been presented and rejected on direct appeal.[98] The Florida Supreme Court did consider the essence of the ineffectiveness aspect on collateral review when it rejected

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95 *Id.* at 331.

96 *Id.* at 325-26.

97 *See Blanco v. Wainwright*, 507 So.2d at 1380 ("We find that eight of [Blanco's] claims are procedurally barred either because they either were or should have been presented on direct appeal...(3) did the trial court err in questioning appellant concerning the presentation of his defense....").

98 *See id.* at 1381 ("On claim three, appellant attempts to revise claim one, which was presented and rejected on direct appeal, into a claim that the trial judge violated appellant's right against self-incrimination by questioning him on disagreements he had with defense counsel concerning the calling of witnesses. We rejected the core of this argument on direct appeal and see no impropriety in the judge directly addressing appellant concerning his desires on the conduct of the trial."). We note that the substantive aspect of this claim was therefore exhausted.

Blanco's argument concerning the existence of a conflict of interest.[99] The claim is thus exhausted, not procedurally defaulted, and it is properly before us. As to claim (2), Blanco raised this issue in his motion for post-conviction relief as part of his ineffectiveness claims, and the Florida Supreme Court did not explicitly assert a procedural bar.[100] To the extent the Florida Supreme Court did assert a procedural bar, the bar was only a result of Blanco's prior exhaustion of this claim on direct appeal. On both of these claims, Blanco clearly has skirted the Scylla and Charybdis of the federal courts' exhaustion and procedural default requirements.

2. Counsels' Sentencing Deficiencies

The Supreme Court requires that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's

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99 *See id.* at 1383. *See generally Hutchins v. Wainwright*, 715 F.2d 512, 519 (11th Cir.1983)("The applicable law requires that a habeas corpus petitioner present 'the substance of a federal habeas corpus claim' to the state courts. However, it is not required that the petitioner present book and verse on the federal constitution....[I]t is the substance of the claim that the court looks to in analyzing whether a federal claim has been voiced." (citations omitted)), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984).

100 *See Blanco v. Wainwright*, 507 So.2d at 1383 ("Appellant next argues that a conflict of interest developed between counsel and himself because of disagreements over whether to call certain witnesses and his own decision to testify and the subsequent disclosure of these disagreements to the trial judge by counsel. We do not agree that this constitutes a conflict of interest or that the disagreements adversely affected counsel's performance....Appellant is simply taking an issue which has already been decided adversely to his position on direct appeal and attempting to relitigate it under the guise of ineffective assistance of counsel."). *See generally Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989)(state court must "clearly and expressly" declare that ruling rests on procedural default before claim will be barred from federal court).

assistance, the defendant must show that counsel's representation fell below an objective standard or reasonableness."[101] In this case, the performance of defense counsel with regard to the sentencing proceedings was objectively deficient in a number of ways.

a. Ineffectiveness Due to Trial Court Interference

[6] As can be seen plainly from the record as set out above,[102] the effectiveness of Blanco's attorneys was significantly impaired by the trial court's intervention in the conduct of the sentencing trial. Blanco became suspicious of the motives of his attorneys, and their efforts were frustrated by the differing and disparate demands made upon them by the court and their client. The trial court's supervision and Blanco's distrust caused counsel to become defensive and to volunteer inappropriate information to the trial court. Due to counsel's delayed and ineffectual efforts to locate witnesses, no evidence at all was presented during the sentencing phase. The district court effectively summarized the evidence relating to many of these errors:

> [Attorney] Rodriguez, acting as interpreter for Blanco, told the court that Blanco did not care whether the jury recommended a life or death sentence. Rodriguez also stated, without prodding from the court, that although counsel desired to call Blanco's brother, Blanco did not want his brother to testify because his brother had shown a lack of [ ]regard by not appearing at trial. Blanco therefore believed that his brother's testimony would not be beneficial. Rodriguez then volunteered that, although Blanco did not want his

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101 *Washington*, 466 U.S. at 687-88, 104 S.Ct. at 2064.

102 *See supra* part III.A.

> brother to appear at the sentencing hearing, he contacted him in any event, but that his brother would not likely appear. Rodriguez also stated that other possible witnesses had been called but that none of them had contacted defense counsel.[103]

The state characterized the statements that Blanco's attorneys volunteered as mere assurances that counsel no longer had a disagreement with Blanco as to which witnesses would be called during the sentencing phase of the trial. However, the trial judge's questioning went on for many transcript pages and was not only an inquiry into whether Blanco knew that his attorneys were acting on his behalf. The court was intent on getting Blanco's and counsels' testimony on the record. The trial court's queries encompassed "who you [counsel] thought might be in his best interest to be called, and what you thought they might say, and why you wanted to call them."[104] Furthermore, counsels' statements went far beyond what was necessary to respond to the court's inquiries. When the trial court questioned counsel as to whether there were any further disagreements, counsel should have simply responded in the negative. Blanco's attorneys did not need to tell the sentencing court that there was no potential mitigating evidence and that none could be found.

We agree with the district court's conclusion that Blanco was denied the effective assistance of counsel by his attorneys' disclosures. Without objection, his two attorneys revealed confidential, damaging information in response to

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103 *Blanco v. Dugger,* 691 F.Supp. at 330 (ciations omitted).

104 Trial transcript, at 1781.

the court's inquiries. This case is aptly described by the words of *Douglas v. Wainwright:*[105]

> The most egregious examples of ineffectiveness do not always arise because of what counsel did *not* do, but from what he *did* do—or say. Apparently, failing to appreciate that the trial judge was the ultimate sentencer, counsel repeatedly emphasized to the judge, during the conference in chambers and out of the hearing of the jury, that not only did counsel have no evidence to proffer at that time but that apparently there was no mitigating evidence that could be produced in Douglas' case.[106]

We can imagine no tactical reasons for the revelations made by counsel, and none have been proffered. We do not hesitate to find that counsels' errors were not "within the range of competence demanded of attorneys in criminal cases."[107]

b. Ineffectiveness Due to Failure to Present Mitigating Evidence

[7, 8] We disagree with the district court's conclusion that counsel were not deficient in their failure to present any mitigating evidence. In order to ascertain whether counsels' failure to present penalty phase mitigating evidence was deficient,

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105 714 F.2d 1532 (11th Cir.1983), *vacated,* 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), *adhered to on remand,* 739 F.2d 531 (11th Cir.1984), *cert. denied,* 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985).

106 *Id.* at 1557 (emphasis in original).

107 *Washington,* 466 U.S. at 687, 104 S.Ct. at 2064 (citation and internal quotations omitted).

> it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end....[If not], it must be determined that defendant suffered *actual prejudice* due to the ineffectiveness of his trial counsel before relief will be granted.[108]

In this case, the attorneys failed to conduct a reasonable investigation, and this failure was not a result of tactical choice.

Following the jury's guilty verdict, defense counsel Rodriguez informed the court that he was not prepared for the penalty phase and needed a continuance to locate witnesses. The trial court stated that he had previously informed counsel that the sentencing phase would commence immediately after the guilt phase was completed. The trial court nevertheless continued the trial for four days, informing the jury that Blanco needed time to produce witnesses.

The next court proceedings were held on the evening before the sentencing phase was to begin. During this charge conference, the trial court queried counsel and Blanco as to the efforts that had been made to locate witnesses. The transcript of the charge conference and attorney Rodriguez' testimony at the collateral hearings are not clear as to what further steps, if any, counsel took over the four-day continuance. Although counsel did attempt to subpoena Blanco's brother to testify, it appears that counsel for the most part waited for the witnesses that Blanco and counsel previously had attempted to contact during an

overnight recess in the guilt phase to return their calls.[109] Counsel never managed to meet with any of these witnesses over the continuance to determine what their testimony might be. With the exception of Blanco's brother, counsel had not talked to any of these witnesses. The record reflects that counsel and Blanco had further conversations concerning he witnesses who would be called during sentencing, and that Blanco indicated he did not want any evidence offered on his behalf.[110] Counsel essentially acquiesced in Blanco's defeatism without knowing what evidence Blanco was foregoing. Counsel therefore could not have advised Blanco fully as to the consequences of his choice not to put on any mitigation evidence.

Blanco presented evidence before the state collateral relief court and the district court that ample mitigating evidence could have been presented before the sentencing jury and judge. Blanco's brother testified that he would have gladly come and given testimony on Blanco's behalf, but he was never contacted by Blanco's attorneys.[111] A number of Blanco's acquaintances from Cuba had immigrated to the United States and would have been willing to give mitigation testimony.[112] These witnesses could have testified as to

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108 *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir.1988) (emphasis in original; citation omitted).

109 Trial transcript, at 1786 ("THE COURT: By the way, just for information on the record, have you had contact with any of those people that he wanted brought in at an earlier time?...MR. RODRIGUEZ: None of them have called. None of them left messages.").

110 *Id.* at 1785 ("THE COURT: So he doesn't want to present any people to come up here and testify in his behalf regarding this phase of the proceedings? MR. RODRIGUEZ: That's what he just stated, Your Honor.").

111 State post-conviction relief hearing transcript, at 61.

112 *Id.* at 69 (Rosa Pinillos); *id.* at 85 (Simeon Pinillos); *id.* at 333 (Girardo Luis Herrara); *id.* at 346 (Martha Venegas).

Blanco's difficult childhood and adolescence. Their testimony at the state collateral relief proceedings was to the effect that Blanco was born to a large family of subsistence farmers in Cuba. His birth was attended with serious medical difficulties, including an initial lack of oxygen. As a child, Blanco suffered from seizures that caused his tongue to become stuck in this throat. Blanco's grandmother had a history of psychosis that required hospitalization. Although Blanco committed several criminal violations while in Cuba, these were relatively minor. His convictions involved an absence without leave from his military garrison and thefts of a bicycle, a lamb, and a pair of shoes. While in prison, Blanco befriended at least one Cuban political prisoner, who became Blanco's sponsor when Blanco immigrated to the United States during the Mariel boatlift.

Blanco also presented evidence of organic brain damage and epileptic disorders. One of Blanco's psychiatric witnesses at the federal evidentiary hearing testified that Blanco's IQ tested in the borderline range of intellectual functioning, between being mentally retarded and possessing low average mental ability. Blanco was diagnosed as suffering from psychotic, paranoid and depressive tendencies as well as exhibiting extremely poor contact with reality.

(1) Background Mitigating Evidence

[9] In rejecting Blanco's argument that counsel were ineffective for failing to present evidence relating to his background, the district court noted that counsel tried to reach a number of Blanco's relatives and acquaintances without success. However, counsel had approximately five months to prepare for trial. Counsel apparently did not personally seek out any witnesses specifically for sentencing prior to trial. When attorney Rodriguez testified at the district court

evidentiary hearing, he was asked why he did not pursue these potential witnesses further:

> Really, I think it was just a matter of time. I don't know if you can tell from the transcript or not, but this is during the trial where we are running until six or seven at night, and there is just not that much you can do at six or seven at night.[113]

Blanco's counsel needed to talk to the witnesses suggested by Blanco, determine whether they could provide helpful testimony, and seek leads on other possible witnesses. From what we can determine, this was not done prior to trial. Once trial started, counsel were too hurried to do an adequate job. To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available.[114] No adequate investigation was conducted in this case.

The district court also did not credit Blanco's arguments concerning the availability of background mitigating evidence, because it found that Blanco's attorneys made a strategic decision not to present such mitigating evidence. This strategic decision was purportedly based upon counsels' fears that Blanco's criminal background in Cuba

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113 R9-109.

114 *See Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness."), *cert. denied*, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985); *cf. Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir.) ("[P]rior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total—and admitted—ignorance about the type of mitigating evidence available to them."), *cert. denied*, 493 U.S. 1011, 110 S.Ct. 573, 107 L.Ed.2d 568 (1989).

would be brought into the trial.[115] However, this finding is belied by counsels' statements. Attorney Rodriguez stated to the trial court, "I think the testimony of a family member should be had at the penalty phase."[116] Rodriguez also informed the trial court, "[T]he reason that I was thinking of calling his brother is to verify his family ties; the fact that he left some of his family in Cuba when he left; the type of strain; the type of emotional state he might have been in because of that, and also tell a little bit about his background, that kind of thing."[117] Moreover, counsel referred to Blanco's status as a Mariel refugee both during voir dire and during closing argument. But counsel failed to introduce any evidence to differentiate Blanco from the stereotype of Mariel refugees as criminals.[118]

[10] The state further contends that Blanco instructed his attorneys not to call any family members or acquaintances to testify. However, this court has held that a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: "The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence is for the client, the lawyer

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115 *See Blanco v. Dugger*, 691 F.Supp. at 325.

116 Trial transcript, at 1754.

117 *Id.* at 1782.

118 *Cf. Card v. Dugger*, 911 F.2d 1494, 1511 (11th Cir.1990)(counsel not ineffective because failure to present background mitigation evidence resulted from trial strategy).

first must evaluate potential avenues and advise the client of those offering potential merit."[119] According to the testimony of attorney Rodriguez in the district court, when Blanco and his attorneys first disputed which witnesses to call, Blanco "started acting irrationally"; "his whole demeanor really changed at that point." "He didn't respond....[H]e was not responding to his attorneys in terms of you would explain something and you would say, this is the reason for it, and, you know, it would just be like talking to a wall."[120] Rodriguez also stated that Blanco was uncommunicative and easily angered. According to Rodriguez, after the jury returned its guilty verdict, Blanco became further depressed and unresponsive. This testimony is confirmed by the statements Blanco made during his discussions with the trial judge to the effect that he believed his attorneys were "lying to my face." During the precise period when Blanco's lawyers finally got around to preparing his penalty phase case, Blanco was noticeably morose and irrational. Counsel therefore had a greater obligation to investigate and analyze available mitigation evidence.[121]

However, Blanco's attorneys, through their negative comments about their client and defense comments about

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119 *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir.1986 (citation omitted), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). We note that a defendant's decision concerning the use of mitigating evidence is more an aspect of overall strategy than a decision as to which witnesses would provide the best legal support for a defense.

120 R9-90-91.

121 *See Thompson*, 787 F.2d at 1451 ("An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." [citation and footnote omitted]).

themselves,[122] instead exhibited signs of their own discouragement. The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

From these facts, we do not see that counsel conducted a reasonable investigation into the availability of mitigating evidence, or that there was a strategic reason for not presenting such evidence.

(2) Mental Health Mitigating Evidence

[11] The district court also rejected the contention that Blanco's mental health mitigating evidence demonstrated ineffectiveness, because Blanco did not show that he was incompetent at the time of trial.[123] But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that

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122 *See, e.g.*, trial transcript, at 1476 (attorney Rodriguez: "A person has to have a certain amount of trust in his attorney...."); *id.* at 1526 (attorney Tenbrook remarks that it will be unnecessary to give Blanco his home phone number because he "[f]ortunately" does not speak Spanish).

123 *Blanco v. Dugger*, 691 F.Supp. at 326.

the sentencing jury and judge should have had an opportunity to consider.[124]

[12] Counsel simply failed to investigate Blanco's mental health status. After the guilty verdict was rendered, one of the reasons counsel requested a continuance was because "I need to prepare...the psychiatric testimony of a Court-appointed psychiatrist."[125] No psychiatrist had been procured prior to this point, and no examination of Blanco was ever conducted. At conference the day before the penalty phase began, counsel informed the court after a brief discussion with Blanco that no mental health mitigation evidence existed.[126] Given that this discussion constituted the extent of counsels' investigation into the availability of mental health mitigating evidence, that such evidence was available, that absolutely none was presented to the sentencing body, and that no strategic reason has been put forward for this failure, we find that counsels' actions were objectively unreasonable.[127]

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124 *See, e.g., Perri v. State,* 441 So.2d 606, 609 (Fla.1983)("A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.").

125 Trial transcript, at 1752.

126 *Id.* at 1784 ("[W]e have discussed the possibility of calling a psychiatrist, and I just don't think it's a matter where [Blanco] has any type of—he certainly does not have a competency problem, and he certainly does not have an insanity problem, and I've seen no evidence of any type of emotional duress that would constitute a mitigating factor in this case.")

127 *See., e.g., Middleton,* 849 F.2d at 493-95 (failure to present available mental health mitigating evidence constituted ineffective assistance).

c. Conclusion

Counsel failed to protect Blanco's confidences and revealed damaging information to the sentencing judge. Counsel also failed to discover and present any of the available mitigating evidence. Singly and together, the errors committed by Blanco's counsel fell below an objective standard of reasonable representation.

3. Sentencing Prejudice

[13] The following standard governs our inquiry into the prejudice suffered by Blanco from counsels' actions: "When a defendant challenges a death sentence..., the question is whether there is a reasonable probability that, absent the errors, the sentencer...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[128] The district court emphatically found that counsels' actions prejudiced Blanco:

> [The state's] position...that the trial court merely engaged in a harmless colloquy with Blanco is rejected on the strength of the clear violations demonstrated by the record. This was no ordinary colloquy, and despite the trial court's and even the prosecutor's good intentions, there is no denying the facts as [previously stated]. The trial court took control of the defense, and by the time the sentencing phase took place, defense counsel acquiesced in this procedure to the detriment of Blanco. Unfortunately, this prejudice is so

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128 *Washington*, 466 U.S. at 695, 104 S.Ct. at 2069.

> apparent, it literally demands that a new sentencing hearing occur.[129]

[14] We agree. As a result of the colloquy between counsel and court, the trial court concluded that none of Blanco's family or friends were willing to testify on Blanco's behalf during sentencing and that there was no other available mitigating evidence.[130] The trial court also concluded that Blanco did not care what punishment was imposed:

> [D]uring the sentencing phase of the trial for Murder in the First Degree, the Defendant, OMAR BLANCO, indicated he did not wish to speak in his own behalf or present any evidence regarding mitigation. He further stated that he did not care if the jury returned an advisory sentence of life or death. This expression by the Defendant, OMAR BLANCO, indicates to this Court that the Defendant, OMAR BLANCO'S, lack of concern for his own life manifests that he would be a dangerous person to return to society. The Defendant, OMAR BLANCO'S, attitude also corroborates his prior exhibitions of utter disregard for the rights and safety of society.[131]

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129 *Blanco v. Dugger*, 691 F.Supp. at 330 n. 17; *see also id.* at 331 ("At various times, without prodding, defense counsel volunteered information for no apparent reason, and which could have no effect but to prejudice the outcome of Blanco's sentencing." (citation omitted)).

130 *See, e.g.*, trial transcript, at 1643 (statement by trial court: "Well, at this time then I'm going to find that substantial efforts have been made to reach these people, including his own brother, wishes to cooperate with him, and it seems like nobody wants anything to do with supporting him in his defense.").

131 *Id.* at 2021 (trial court's findings in support of armed robbery sentence).

The district court found that the trial court reached this latter conclusion "only as a result of its interrogation of Blanco and his counsel concerning the availability of witnesses for the sentencing hearing and the *reasons* for calling or not calling witnesses. Manifestly, counsels' failure to protect their client's rights at the sentencing phase resulted in 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "[132]

The state urges that the fact that the trial judge knew that Blanco would not present mitigating evidence because he could not locate any favorable witnesses did not prejudice Blanco, because courts are allowed to make inquiries in sentencing matters that extend beyond the evidence formally introduced during trial.[133] The state also maintains that the district court erred in concluding that the information learned by the trial court was used in sentencing Blanco to death; this information was used only in the court's sentencing on the armed burglary conviction. The state notes that this court should not presume that the same information was considered *sub silentio* by the trial judge in sentencing, as judges routinely hear inadmissible evidence they are presumed to ignore when making decisions.[134]

We find that the trial court's statements indicate that the trial court considered Blanco's responses to the court's questions to be quite aggravating and that, regardless of whether the trial court could have put the sentiments out of mind as

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132 *Blanco v. Dugger*, 691 F.Supp. at 330 (citation omitted; emphasis in original).

133 *Johnson v. Wainwright*, 778 F.2d 623, 632-33 (11th Cir.1985) (demeanor may be considered by judge in capital sentencing), *cert. denied*, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987).

134 *See, e.g., Harris v. Rivera*, 454 U.S. 339, 347, 102 S.Ct. 460, 465, 70 L.Ed.2d 530 (1981).

not in evidence, it in fact did not.[135] It is true that the trial court's statements as to Blanco's lack of remorse were made in the course of the trial court's pronouncement of Blanco's sentence for armed robbery. However, the armed robbery sentence was pronounced concurrently with Blanco's death sentence, which indicates that these sentiments likely factored into the trial court's balancing of the aggravating and mitigating factors. And other disparaging statements by the trial court—to the effect that it was clear Blanco did not know anyone who thought enough of him to come to court—were made during the course of Blanco's death sentencing proceedings. Given the lengthy controversy that occurred as the result of the trial court's inquiry into which witnesses Blanco would call, it would have been nearly impossible for the trial court not to have considered the lack of witnesses adversely to Blanco.[136] Because the revelations were so prejudicial, there is a reasonable probability that the trial court would have weighed the aggravating and mitigating circumstances differently.

[15] It is also clear that Blanco was prejudiced by counsels' failure to put on any mitigating evidence during the penalty phase. The jury recommended a death sentence by a vote of eight to four. As in *Armstrong v. Dugger,*[137] evidence was available concerning Blanco's impoverished childhood, epileptic seizures, and organic brain damage. As in

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135 *See, e.g., Proffitt v. Wainwright,* 685 F.2d 1227, 1255 (11th Cir.1982) (rejecting trial judge's testimony that he made no use of psychiatrist's report that was admitted without affording defendant opportunity for cross-examination), *cert. denied,* 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983).

136 *See Douglas v. Wainwright,* 714 F.2d at 1557 ("[A] vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence.").

137 *Id.* at 833 F.2d 1430 (11th Cir.1987).

Armstrong, "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement."[138] Moreover, the lack of mitigation witnesses was brought to the jury's attention during the sentencing phase when the court announced that the trial would be recessed to allow Blanco to procure additional witnesses.[139] When the jury returned following the continuance and no witnesses were produced, the jury easily could have concluded that the defense attorneys could discover nothing positive or mitigating in Blanco's background. Given that some members of Blanco's jury were inclined to mercy even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to Blanco's attorneys had they more thoroughly investigated, we find that there was a reasonable probability that Blanco's jury might have recommended a life sentence absent the errors.

4. Conclusion

Counsel's less that vigilant approach to the protection of their client's confidences and the haphazard and desultory efforts made by counsel to secure mitigation evidence resulted in representation that fell below any objective

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138 *Id.* at 1434 (citation omitted); *see also, e.g., Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir.1991) (finding prejudice where little evidence of skull fracture and no evidence of mental retardation, socioeconomic background, or work or community reputation was presented); *Harris*, 874 F.2d at 763-64 (finding prejudice due to failure to investigate and present mitigating evidence); *Middleton*, 849 F.2d at 495 (finding prejudice due to failure to present mental health mitigating evidence).

139 *See* trial transcript, at 1759 ("[I]t's been indicated to me that there may be some evidence that the defense wishes to present in connection with that second phase in the proceedings involving some people who might not be available at this minute....").

standard of reasonableness. This combination of attorney errors leads us to conclude that Blanco was severely prejudiced during the penalty phase of his trial and is due a new sentencing proceeding.

IV. FEDERAL EVIDENTIARY HEARING

[16] The state argues that the district court violated principles of comity when it decided to hold an evidentiary hearing on Blanco's claims. The state claims that Blanco's state post-conviction relief hearing was sufficient, as Blanco presented a total of eleven witnesses. Also, twelve of the fifteen claims before the state habeas court were also before the federal habeas court. The state relies on *Townsend v. Sain*[140] for the proposition that Blanco had to demonstrate the existence of one of *Townsend's* enumerated factors prior to the granting of an evidentiary hearing by a federal court.

28 U.S.C. § 2254(d) subsequently codified the *Townsend* criteria.[141] This court has discussed the relationship between *Townsend* and the statute: "*Townsend* was not...completely superseded by the amendment [to 28 U.S.C. § 2254(d)], for the Supreme Court decided when a federal evidentiary hearing is mandatory while the habeas corpus statute, as amended, merely establishes a presumption that the state court judgment is correct unless the applicant establishes one of a number of specific reasons to disregard it."[142]

The *Townsend* test thus only refers to situations where the district court is *required* to hold an evidentiary hearing. *Townsend* itself states, "The purpose of the test is to indicate

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140 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

141 *See Guice v. Fortenberry*, 661 F.2d 496, 500 (5th Cir.1981) (en banc).

142 *Id.* at 501 (footnote and citation omitted).

the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge....In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim."[143] *Townsend* does not limit the discretion of a district court to hold an evidentiary hearing.

In this case, the district court determined that further evidence needed to be taken on Blanco's claims that his counsel were ineffective for failing to subpoena witnesses required by Blanco, that his counsel were ineffective for failing to ensure the presence of an interpreter throughout the trial proceedings, and that his counsel were ineffective for failing to determine whether he was competent to stand trial.[144] The district court properly exercised its discretion by choosing to hear evidence only on certain of Blanco's claims, and we refuse to disturb that exercise of discretion.[145]

V. INEFFECTIVENESS AND COMPETENCY TO STAND TRIAL

Blanco argues that he was mentally incompetent to stand trial, as he suffered from organic brain damage, mental illness, a foreign cultural background, and language difficulties. Blanco asserts that, despite indications of this incompetence during trial, counsel failed to conduct any

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143 *Townsend*, 372 U.S. at 318, 83 S.Ct. at 760.

144 R6-42.

145 *See also In re Wainwright*, 678 F.2d 951, 952-53 (11th Cir.1982)(district court may hold evidentiary hearing to determine whether to apply presumption of correctness under 28 U.S.C. § 2254(d) to state court proceedings).

inquiry into Blanco's background and were therefore ineffective. Blanco cites *Futch v. Dugger*[146] for its holding that

> counsel could have been ineffective either by failing to make reasonable investigation into petitioner's competency or by failing to make a reasonable decision that such investigation was unnecessary. In order to demonstrate prejudice form counsel's failure to investigate his competency, petitioner has to show that there exists "at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial."[147]

Blanco acknowledges that this standard requires "concrete examples suggesting that at the time of trial he did not have the ability to consult with his lawyer or that he did not understand the proceedings against him."[148] Blanco argues that he in fact provided ample evidence to the district court showing that counsel should have made an investigation into his competence.

[17] While as discussed previously Blanco did exhibit signs during trial that he might have had some mental health problems, and while Blanco's attorneys may have been deficient in not seeking an examination for sentencing purposes, we are confident that Blanco was not prejudiced by his attorneys' failure to seek a competency examination. The district court (and the state courts) found no factual basis to support a claim of incompetency at the time of trial. The district court did not find believable Blanco's witnesses who testified as to his incompetence. The district court also

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146 874 F.2d 1483, 1486-87 (11th Cir.1989).

147 *Id.* at 1487 (citations omitted).

148 *Alexander v. Dugger,* 841 F.2d 371, 375 (11th Cir.1988).

concluded from the trial transcript that Blanco was competent, understood the proceedings, and could consult with counsel, due to the discussions between Blanco and the trial court and counsel.[149] Blanco has accordingly shown no prejudice, and his claim that his attorneys were ineffective in failing to seek a competency determination must fail.

VI. LACK OF INTERPRETATION/ABSENCE FROM PROCEEDINGS

Blanco argues that proceedings were conducted without an interpreter during certain stages of the trial and that Blanco himself was allowed to be absent from certain stages in the proceedings. Blanco spoke very little English, and requested that the trial court appoint a translator, which it did. He was also assisted at trial by attorney Rodriguez, who spoke Spanish. Blanco further alleges his attorneys were ineffective for failing to guarantee an interpreter and his presence during all stages of the trial.

[18] The district court noted that the substance of these related claims were found to be procedurally barred by the Florida Supreme Court. However, the district court also found that the claims were without merit.[150] On appeal, the state presses its argument that this entire claim is procedurally barred. The state is correct that Blanco only presented one substantive aspect of these claims in his state court direct appeal: Blanco argued that the trial court erred in making factual findings in his absence.[151] On Blanco's

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149 *See Blanco v. Dugger*, 691 F.Supp. at 324-25.

150 *Id.* at 323-24.

151 *See Blanco v. State*, 452 So.2d at 523-24 ("Appellant next argues that the trial court erred in making statements on the record in appellant's absence to explain a ruling it had made on the legality of appellant's arrest.").

appeal of the denial of his motion for post-conviction relief, the Florida Supreme Court found that Blanco's "attempts to expand the claim by arguing that he did not receive a simultaneous translation of all proceedings and was not present at bench conferences held outside the hearing of the jury"[152] were procedurally barred because of the failure to raise the expanded claim on direct appeal. Accordingly, only Blanco's claim that the trial court erred by making factual findings in his absence is not barred. This incident occurred outside of the presence of the jury and related to the trial court's legal ruling on one of Blanco's pretrial motions. We find no merit in this claim and agree with the Florida Supreme Court and the district court that the trial court's actions in Blanco's absence did not occur during a "critical stage[] of the trial proceedings."[153]

[19] As to Blanco's additional claim that his attorneys were ineffective for failing to ensure his presence and that of an interpreter during several proceedings, we note only that Blanco has not been able to demonstrate any likelihood that he would not have been convicted had his attorneys secured his presence and that of an interpreter during trial. Blanco therefor has demonstrated no prejudice.

VII. SUGGESTIVENESS OF PRETRIAL IDENTIFICATIONS

[20] Two eyewitness identifications are at issue in Blanco's appeal: that of Thalia Vezos, the niece of the victim, and that of George Abdeni, a neighbor who observed the murderer leaving the scene of the crime. This circuit has established

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152 *Blanco v. Wainwright*, 507 So.2d at 1380.

153 *United States v. Vasquez*, 732 F.2d 846, 849 (11th Cir.1984); *see United States v. Gradsky*, 434 F.2d 880 (5th Cir.1970) (right to preserve does not extend to evidentiary hearing on suppression motion), *cert. denied*, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1972).

a two-step test in determining whether identification procedures are constitutional. The first step is to determine whether the procedures used were unduly suggestive.[154] If so, the second step is to determine whether, under the totality of the circumstances, the identification was reliable.[155] The factors that go into this "totality of the circumstances" test include: the opportunity to view, the degree of attention, the accuracy of the description, the level of certainty, and the length of time elapsing between the crime and the identification.[156]

A. Thalia Vezos

[21] Blanco argues that the circumstances surrounding Thalia Vezos' identification of Blanco were impermissibly suggestive. Immediately after the shooting, Vezos gave a statement in which she told police that she did not recall that the murderer had any facial hair. The next day at the police station, the police told her to read her previous statement, then showed her a lineup where everyone but Blanco had noticeable facial hair. Also, Blanco was older and heavier than the other members of the lineup and was dressed strangely. Vezos then picked out Blanco.

The district court determined that "Blanco's appearance was in no manner substantially distinguishable from the others [in the lineup so as] to render the procedure

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154 *See Dobbs v. Kemp*, 790 F.2d 1499, 1506 (11th Cir.1986), *modified in part on other grounds*, 809 F.2d 750 (11th Cir.), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

155 *See Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); *see also Cikora v. Dugger*, 840 F.2d 893, 895 (11th Cir.1988).

156 *Biggers*, 409 U.S. at 199, 93 S.Ct. at 382.

impermissibly suggestive."[157] But even assuming arguendo that the lineup was in fact suggestive, it is clear that Vezos' identification was reliable under the totality of the circumstances. Vezos had an excellent opportunity to view the accused because she was in the presence of the intruder for ten minutes. Also, there was a light on in her room and the hallway. Vezos exhibited a high level of certainty in her identification, as she pointed out Blanco the instant he walked into the lineup room; the police officer accompanying her had to instruct her to wait until she had seen all the men before making a positive identification. Finally, the length of time between the crime and the identification was brief: The lineup identification occurred the day after the crime. We also note that Vezos was extensively cross-examined concerning discrepancies between her statement to the police and her identification, and the jury was able to weigh these discrepancies in reaching its verdict. The lineup identification was sufficiently reliable to be admissible.

B. George Abdeni

[22] Blanco argues that the "show up" identification made by witness Abdeni was impermissibly suggestive and unreliable. Abdeni, a neighbor of the victim, told police he had seen a figure—he was not certain if it was a man or a woman—dressed in a "grayish" jogging suit in front of the victim's house immediately after the murder. Abdeni was not able to see the upper portion of the figure, due to some tree branches. Following Blanco's arrest shortly after the murder, Blanco was brought back in order for Abdeni to identify him. Abdeni immediately told police that this was the person

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157 *Blanco v. Dugger*, 691 F.Supp. at 312; *cf. Cikora*, 840 F.2d at 897 (finding no impermissible suggestiveness in lineup procedure in which appellant's facial hair was more sparse than most of the other participants').

he had seen in front of the house. The district court found that the identification was sufficiently reliable under the totality of the circumstances. Blanco now argues that Abdeni's initial statements to the police were so vague that the subsequent "show up" identification was invalid.

This court has written,

> Although show-ups are widely condemned, immediate confrontations allow identification before the suspect has altered his appearance and while the witness' memory is fresh, and permit the quick release of innocent persons. Therefore, show-ups are not unnecessarily suggestive unless the police aggravate the suggestiveness of the confrontation.[158]

In this case, Blanco was simply presented to Abdeni. The police did not aggravate the suggestiveness of the encounter. While Abdeni's identification was certainly less reliable than that of Vezos' identification, it does possess the attribute of having been made quite soon after the initial sighting. Also, defense counsel fully pointed out to the jury the various problems with Abdeni's identification.

If this were the only evidence of Blanco's guilt, it would not be sufficient to support the conviction. However, the other evidence introduced at trial, particularly Thalia Vezos' identification, made Abdeni's identification cumulative. The error here, if any, was harmless beyond a reasonable doubt. We do not find that the district court erred in refusing relief on this issue.

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158 *Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir.1987) (citations omitted).

VIII. ADMISSION OF STATEMENTS

When Blanco was first arrested, he was interrogated without being given warnings pursuant to *Miranda v. Arizona.*[159] He was transferred to the police station, where he refused to answer questions without an attorney. After several hours, he made further statements to the police. The trial court suppressed the statements given to the police on *Miranda* grounds. However, the trial court made a determination that the statements were voluntary. At trial, the state impeached Blanco's testimony with these statements. The statements involved were that (1) Blanco told the police officer who stopped him that he had been riding a bicycle and running for thirty or forty miles, and that was why he was in the area; and (2) Blanco stated that his identification papers were at his apartment when the police questioned him as to their whereabouts.[160] The first statement was used to impeach Blanco's credibility after he testified at trial; the state contended during closing argument that it was unbelievable that Blanco could have exercised that much, particularly without working up a sweat (Blanco was not sweating when arrested).[161] The second statement was used to highlight the fact that, although Blanco during trial claimed to have lost his identification papers, he originally claimed to have left his identification papers at home.

[23, 24] Blanco argues that his statements were not voluntary; therefore, the state should not have been allowed to introduce his statement for impeachment purposes.[162] For evidence of this involuntariness, Blanco points to the failure

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159 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

160 *See* trial transcript, at 1652-53.

161 *See id.* at 1683-84.

162 *See Mincey v. Arizona,* 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978).

to give warnings pursuant to *Miranda* and the failure to provide an attorney. In making this argument, Blanco seems to conflate the voluntariness prong of *Miranda* analysis with the "knowing and intelligent" prong. To determine whether a confession was voluntary, courts focus upon suspects' motives for confessing. To determine whether a confession was given following a knowing and intelligent waiver of fifth amendment rights, courts focus on suspects' comprehension of their rights.[163] The failure by the police to read Blanco his *Miranda* rights or to provide access to an attorney goes to Blanco's comprehension of his rights, not to his motive in confessing. Blanco also argues that his difficulty in communicating with the interrogating officers and his general bewilderment demonstrate involuntariness. We disagree.

Blanco has not alleged any sort of physical compulsion or other overbearance of his will.[164] The district court

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163 *See generally Smith v. Zant*, 887 F.2d 1407, 1428 (11th Cir.1989) (en banc) (Kravitch, J., concurring in part and dissenting in part)("The 'voluntariness' inquiry is concerned solely with the defendant's motive in waiving his *Miranda* rights. The 'knowing and intelligent' inquiry, on the other hand, does not look to the defendant's motive, nor does it consider *post hoc* the efficacy of the waiver; instead, the 'knowing and intelligent' inquiry focuses solely on whether the suspect understands what he is doing.").

164 *See, e.g., Colorado v. Spring*, 479 U.S. 564, 573-74, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) ("Absent evidence that Spring's 'will [was] overborne and his capacity for self-discrimination critically impaired' because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary under this Court's decision in *Miranda*." [citations omitted]).

independently evaluated the state court record[165] and found that Blanco's statement were voluntary.[166] We agree with the district court's conclusions.[167]

[25] Blanco also argues that the trustworthiness of his statements is called into question by the fact that the officer who interrogated Blanco had very limited Spanish-speaking ability, and thus the translation of Blanco's statements was questionable. The Supreme Court has held that statements taken in violation of *Miranda* may be used to impeach a defendant's credibility if their "trustworthiness...satisfies legal standards."[168] The translating officer's interpretation of Blanco's statements was trustworthy; the officer was born in Cuba, spoke Spanish every day at home, and took high school courses in Spanish.[169]

[26] We do not find that Blanco's statements were improperly admitted to impeach his testimony. Moreover, any error was harmless beyond a reasonable doubt, because Blanco's statement did not directly reflect his guilt but

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165 Blanco argues that the district court improperly employed a "clearly erroneous" standard of review of the state court's finding of voluntariness. Federal courts are not bound by state court determinations of voluntariness and are under an obligation to make an independent review of the record. *See Mincey v. Arizona*, 437 U.S. at 398, 98 S.Ct. at 2416. Despite the district court's mistaken statement as to the standard of review, we are satisfied that the district court in fact conducted an independent review of the record. *See Blanco v. Dugger*, 691 F.Supp. at 320-31 (discussing facts surrounding taking of Blanco's statements).

166 *See Blanco v. Dugger*, 691 F.Supp. at 320-21.

167 *See Oregon v. Hass*, 420 U.S. 714, 722-23, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) ("[T]he pressure on [Hass] was no greater than that on any person in like custody or under inquiry by any investigating officer.").

168 *Harris v. New York*, 401 U.S. 222, 224, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971).

169 Trial transcript, at 1651.

merely operated to weaken his already flimsy guilt phase defense.

IX. SUFFICIENCY OF THE EVIDENCE

[27] Blanco asserts that the evidence presented at trial was insufficient to convict him of premeditated murder. Blanco construes the evidence as showing only that the victim startled Blanco during the attempted robbery, a fight ensued, and the victim was shot without premeditation. Given the facts of the crime, as set out above and the Florida courts' definition of premeditation,[170] we find that this contention is meritless.

X. CONCLUSION

The district court properly refused to grant habeas corpus relief to Omar Blanco on his conviction for murder. The district court was correct to grant the writ as to Blanco's death sentencing proceedings, due to the ineffectiveness of his attorneys. We have not considered any other sentencing phase issues raised by this case. The district court is AFFIRMED.

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170 *See Sireci v. State*, 399 So.2d 964, 967 (Fla.1981) (defining premeditation), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5758

OMAR BLANCO,

versus

HARRY K. SINGLETARY, as Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Southern District

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Opinion September 30, 1991, 11th Cir., 1991 ___F.2d___).

Before: TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and CLARK, Senior Circuit Judge.

PER CURIAM:

THE Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of

the Court and a majority of the Circuit Judges who are in regular active service no having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

CHIEF JUDGE

OMAR BLANCO, Petitioner,

v.

RICHARD DUGGER, Respondent.

No. 87-6685-CIV.

United States District Court
S.D. Florida.

July 11, 1988.

Petition was filed for writ of habeas corpus. The District Court, Hastings, J., held that: (1) petitioner's sentencing in state court was unconstitutionally tainted by trial court's interrogating petitioner and failing to warn him that answers elicited could be used in sentencing; (2) counsel was ineffective for failing to object to trial court's directions requiring them to present witnesses; and (3) trial court's instructions to jury regarding sentencing were fundamentally unfair.

Writ granted.

1. Constitutional Law 266(3.1)

Criminal Law 339.7(4)

State defendant's appearance was in no manner substantially distinguishable from others in photographic lineup so as to render identification procedure impermissibly suggestive and lineup did not violate due process; while defendant and other for lineup subjects were approximately same height, defendant claimed that his facial hair and manner of dress differentiated him from the others. U.S.C.A. Const. Amends. 5, 14.

2. Habeas Corpus 45.3(1.40)

Full record of identification procedure was developed at state trial and did not preclude informed and reasoned decision regarding constitutionality of lineup; record was replete with evidence and testimony regarding identification procedures.

3. Criminal Law 339.8(5)

Although showup was arguably not the best method to conduct identification of state murder suspect, totality of circumstances demonstrated that police did not aggravate suggestiveness of showup by victim's neighbor, and therefore, confrontation was not impermissible; neighbor had sufficient opportunity to observe person leaving victim's premises to give description of suspect's form and clothing, and neighbor told police and later, jury, that he could only recognize suspect's body form and type of clothing and that habeas petitioner fit both criteria.

4. Homicide 354

First-degree murder committed in connection with armed burglary did not meet definition of "heightened premeditation" but was only simple premeditation which could not be used as an aggravating factor when considering imposition of death sentence under Florida law. West's F.S.A. § 921.141(5)(i).

5. Homicide 22(2)

Level of premeditation necessary to convict defendant in Florida court in guilt phase of first-degree murder trial did not have to rise to level of premeditation required to find an aggravating circumstance supporting imposition of death

sentence. West's F.S.A. § 921.141(5)(i).

6. Criminal Law 1208.1(5)

Florida trial court could consider a defendant's previous armed robbery conviction as an aggravating circumstance supporting imposition of death penalty, even though after death penalty was imposed appellate court reversed prior armed robbery conviction, where conviction was subsequently reaffirmed upon retrial.

7. Habeas Corpus 45.3(1.50)

Even if claim that underlying felony should not have been used as aggravating circumstances for imposing death penalty under Florida law had never been addressed by state court, it may have been ineffective for previous counsel to have avoided legal question, and therefore, district court in habeas proceeding would discuss merits of claim. U.S.C.A. Const. Amend. 6.

8. Criminal Law 1208.1(5)

Underlying armed burglary felony could be used as aggravating circumstance for imposing death penalty under Florida law. West's F.S.A. §§ 775.082, 782.04.

9. Burglary 41(1)

Homicide 253(1)

Evidence was sufficient to sustain Florida conviction for first-degree murder and armed burglary; defendant was identified by witness, defendant's driver's license and wallet were found in victim's home, "Be On the Lookout" bulletins supplied by eyewitness substantially matched defendant's

description, and defendant was found near scene of crime.

10. Arrest 63.4(11)

A "Be On the Lookout" police order supplied sufficient probable cause to arrest defendant; therefore, any statements obtained by Florida officers as a result of arrest were not tainted.

11. Criminal Law 412.2(3)

Statements defendant made after he was arrested and interrogated without receiving *Miranda* warnings were inadmissible in state trial; however, statements regarding defendant's wallet and identification and that he regularly rode his bicycle to one area and ran several miles along beach were not coerced, were not voluntary and admissible for impeachment purposes.

12. Habeas Corpus 45.2(7)

Habeas petitioner failed to present any evidence that jury in state murder trial was evenly divided, and thus, he was not entitled to relief on basis that jury was improperly instructed that a majority was needed to return sentence of life imprisonment when correct statement of law in Florida was that a tie among jurors would result in imposition of life, rather than death, sentence.

13. Criminal Law 723(1)

Prosecutor's remarks in closing argument at sentencing, comparing defendant and victim were minimal and not so inflammatory as to prejudice jury's recommendation of death penalty.

14. Habeas Corpus 98

In reviewing federal habeas challenge to state criminal judgment, issue of ineffectiveness of counsel is a mixed question of law and fact U.S.C.A. Const.Amend. 6.

15. Criminal Law 641.13(2,5)

Instances during pretrial and state trial proceedings when defendant was not present in courtroom were not critical stages of trial proceedings, and counsel was not ineffective for either waiving defendant's presence or not objecting to his absence; all incidents occurred outside presence of jury and all discussions pertained to legal matters. U.S.C.A. Const. Amend. 6.

16. Criminal Law 1166.11(5)

Even if defense counsel were in error by failing to insure that interpreter was present at every stage of state criminal proceedings, setting aside judgment of trial court was not warranted; whatever gaps in interpreting may have occurred were at noncritical stages in proceedings, and therefore, any error was harmless. U.S.C. A. Const.Amend. 6.

17. Criminal Law 641.13(6)

Evidence supported finding that defense counsel were reasonable in deciding not to put on psychiatric testimony in state murder and armed burglary trial; medical evidence presented by defendant was not believable. U.S.C.A. Const.Amend. 6.

18. Criminal Law 641.13(7)

Any failure of trial counsel to adequately investigate defendant's family background to establish claim of mitigation during sentencing phase of state murder and armed burglary trial did not constitute ineffective assistance; defendant failed to communicate to counsel that he had family and friends available, defendant's brother failed to aid counsel at trial despite attempts to reach him, and there was harmful information about defendant's criminal history in Cuba which may have come out through testimony of his family and friends. U.S.C.A. Const.Amend. 6.

19. Criminal Law 641.13(7)

Even if defense counsel was ineffective in state trial in failing to adequately investigate defendant's family background to establish claim of mitigation during sentencing of state murder and armed burglary trial, defendant failed to demonstrate with any certainty that presentation of family background information would have changed outcome at sentencing. U.S.C.A. Const.Amend. 6.

20. Criminal Law 641.13(7)

Defense counsel in state murder and armed burglary trial was not ineffective for failing to present any information at sentencing in an attempt to disprove the "Marielito myth"; counsel believed that any mention of defendant's Mariel status above that which was absolutely necessary would be harmful to case given prejudice against Marielitos during time of defendant's trial. U.S.C.A. Const.Amend. 6.

21. Habeas Corpus 45.2(6)

State trial court's conduct in ordering defense counsel to locate habeas petitioner's requested witnesses and present their testimony when petitioner and counsel disagreed as to whether witnesses should testify was in complete disregard for defense counsel's deliberate trial strategy and was clear error; however, error was not so prejudicial as guilt-innocence phase of murder and armed burglary trial as to warrant issuance of writ of habeas corpus.

22. Habeas Corpus 25.1(6)

State trial court's interrogation of habeas petitioner and concurrent failure to warn him that answers elicited could be used in sentencing so tainted sentencing hearing as to render his right to fair hearing a nullity, and defense counsel's failure to object constituted ineffective assistance. U.S.C.A. Const.Amend. 6.

23. Habeas Corpus 25.1(6)

Disclosures of defense counsel to trial court during sentencing phase constituted ineffective assistance warranting habeas relief; at various times defense counsel volunteered information to judge for no apparent reason and information could have had no effect but to prejudice outcome of sentencing in state murder and armed burglary trial. U.S.C.A. Const. Amend. 6.

24. Habeas Corpus 45.3(1.50)

Claim that state trial court, along with prosecutor, incorrectly led jury to believe that their role in sentencing was insignificant by impressing upon jury that final decision as to what punishment would be imposed was responsibility of

judge was not procedurally barred, although it was not raised on direct appeal and was subsequently denied by Florida Supreme Court in postconvicton proceeding; there was substantial change in law with respect to issue which was previously unavailable to raise on appeal, thereby warranting review of merits by district court in habeas proceeding.

25. Criminal Law 1213.7

Habeas Corpus 45.2(7)

State trial court's instructions to jury impressing upon them that final decision as to what punishment would be imposed with respect to death sentence was responsibility of judge was so fundamentally unfair as to violate Eighth Amendment and warrant habeas relief. U.S.C.A. Const.Amend. 8.

Mark E. Olive, Chief Asst., Capital Collateral Representative, Tallahassee, Fla., for petitioner.

Carolyn V. McCann, Asst. Atty. Gen., West Palm Beach, Fla., for respondent.

REVISED MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF HABEAS CORPUS.[1]

HASTINGS, District Judge.

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1 This Court issued its first memorandum opinion and order concerning this matter on April 27, 1988. On May 16, 1988, this Court granted Respondent's motion for reconsideration of that order. Both parties have now provided this Court with additional pleadings and authorities which have greatly assisted in clarifying the issues. The following is the Court's revised order in light of these pleadings. Any argument raised on reconsideration, but not expressly treated in this revised opinion has been considered by this Court and is denied on the merits.

THIS CAUSE comes before the Court upon Petitioner Omar Blanco's Petition for Writ of Habeas Corpus. After granting a stay of execution to review the claims set forth herein, presiding over an evidentiary hearing, a careful consideration of all materials submitted along with the record, and being fully advised, this Court's opinion and order are set forth below.

PROCEDURAL HISTORY

Petitioner Omar Blanco, (hereinafter referred to as "Blanco"), was tried by a jury and convicted on June 11, 1982 of first degree murder and burglary while armed with a handgun. On June 21, 1982, Blanco was sentenced to death by electrocution on the first degree murder conviction and to a consecutive sentence of seventy-five (75) years with a mandatory minimum of three (3) years imprisonment on the armed burglary conviction.

Blanco directly appealed his conviction to the Supreme Court of Florida, raising nine (9) issues, several of which are reasserted here. The Florida Supreme Court affirmed the conviction and sentences. *Blanco v. State,* 452 So.2d 520 (Fla. 1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985) (hereinafter referred to as *"Blanco I"*). (A full description of the facts regarding this crime are set forth in *Blanco I,* 452 So.2d at 522-23 and are adopted by this Court for the purposes of this opinion.) On January 7, 1986, the Governor of Florida signed a death warrant for Blanco. On January 31, 1986, Blanco filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, raising eleven claims. The trial court entered a stay of execution on February 3, 1986. On that same date, Blanco also filed a state court petition for writ of habeas corpus in the Supreme Court of Florida,

raising only two claims, both of which included many of the sub-issues asserted here.

After an evidentiary hearing, the trial court denied the motion for post-conviction relief on April 21, 1986 and Blanco appealed to the Supreme Court of Florida. On May 7, 1987, the Supreme Court of Florida affirmed the trial court's denial of the 3.850 motion and denied habeas corpus relief. *Blanco v. Wainwright,* 507 So.2d 1377 (Fla. 1987), *rehg. denied* (July 10, 1987) (hereinafter referred to as *"Blanco II"*).

The Governor signed a second death warrant for Blanco on August 18, 1987 with the execution date set for September 17, 1987. Blanco filed a Petition for Writ of Habeas Corpus in this Court on September 16, 1987 at 2:33 P.M. This Court, after reviewing the record and presiding over oral argument on Blanco's motion to stay execution, granted a stay. An evidentiary hearing was held on January 4 and 5, 1988, where counsel were ordered to present evidence on several claims and oral argument or additional briefs on others.

After a careful review of the record and being fully advised, this Court has examined at length the merits of all fifteen claims asserted by Blanco and its findings are set forth below.

INDIVIDUAL CLAIMS [2]

CLAIM I: PRE-TRIAL IDENTIFICATION PROCEDURES

A. Lineup: Identification Testimony of Thalia Vezos

Blanco was identified by Thalia Vezos as the person who shot and killed the victim. Vezos, a fourteen year old girl, was in the house when her uncle, the victim, was shot. In analyzing challenged identification,

> [t]his circuit has adopted a two-step analysis for determining whether identifications based on a lineup or photo array are so unreliable as to violate due process. We must first decide whether the original identification procedure was unduly suggestive. If not, that ends the inquiry. If so, however, we must then determine whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

Williams v. Weldon, 826 F.2d 1018, 1021 (11th Cir. 1987). "Reliability is the linchpin in determining the admissibility of identification testimony." *Williams,* 826 F.2d at 1021, *citing Mason v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977).

[1] Here, Ms. Vezos identified Blanco in a lineup conducted only one day after the murder. (T. 91-92). A police detective cautioned Ms. Vezos to view the entire lineup before making her decision (T.101-102). After viewing all the lineup participants, she then positively identified Blanco as the person who shot her uncle (T. 102). While Blanco and

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2 The claims as addressed in this opinion are not presented in the same order as raised by Blanco in his petition.

the other four lineup subjects were approximately the same height, Blanco claims that his facial hair and manner of dress differentiated him from the others.

This Court has examined the photographs of the lineup viewed by Ms. Vezos and agrees with the trial court that Blanco's appearance was in no manner substantially distinguishable from the others to render the procedure impermissibly suggestive. Accordingly, the lineup did not violate due process under the test of *Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), which requires that "the conduct of identification procedures...[not] be...'unnecessarily suggestive and conducive to irreparable mistaken identification.'" *Foster,* 394 U.S. at 442, 89 S.Ct. at 1128.[3]

[2] Blanco also contends that a full record of this issue was not developed at trial thereby precluding an informed and reasoned decision regarding the constitutionality of the lineup. This Court disagrees. The record is replete with evidence and testimony regarding the identification procedures (T. 90-92; 101-102; 158-159; 898-900). Additionally, this Court has independently reviewed the lineup photographs and had determined that the standard enunciated by the United States Supreme Court in *Sumner v. Mata,* 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed. 2d 480 (1982) has been met. That standard is, that the trial court's findings are "fairly supported by the record." Therefore, "the

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3 In the *Williams* case, the petitioner was the only black man in the lineup, but the Eleventh Circuit Court of Appeals found that "the other members of the group all had similar skin tone and facial characteristics...[and] [t]he group was similar in appearance to the generally consistent description of the robber given by the...witnesses." *Williams,* 826 F.2d at 1021.

presumption of correctness...control[s]." *Sumner,* 455 U.S. at 593, 102 S.Ct. at 1305.[4]

B. Show Up: Identification Testimony of George Abdeni

Mr. George G. Abdeni, the victim's neighbor, immediately after the murder, observed a "form dressed in a short of a grayish jogging suit pass by in front of the house on the lawn, not on the street, and go towards bayview" (T. 794). Pursuant to the description given by Abdeni and Vezos, a "Be On the Lookout" (BOLO) police order was issued throughout the area. The BOLO described the suspect as follows:

1. Race and sex: Latin male
2. Height: 5'10"
3. Hair: Black and curly
4. Complexion: Dark
5. Facial Hair: Moustache
6. Clothing: Gray or light-green sweatsuit
7. Location: Last seen running in an easterly direction

(T 814).

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4 On reconsideration, Blanco also suggests that this Court conduct an evidentiary hearing on this issue. This Court has already conducted one hearing at which Petitioner was invited to submit additional support or argument on this claim. Blanco failed at that time to produce any evidence on this issue and elected instead to submit the issue to this Court in a brief. Thus, Blanco cannot now be heard to complain regarding the procedure this Court utilized to review this claim.

Blanco was seen near the victim's home and stopped by a police officer, Officer Price (T. 813-836). Offier Price determined that Blanco fit a majority of the seven part BOLO (T. 816). On this basis, Officer Price correctly determined that he had probable cause, arrested Blanco, and then brought him to the scene of the crime. The police presented Blanco to Abdeni to determine if Blanco was the person who Abdeni had been (T. 820). Although Abdeni had difficulty ascertaining whether the form he described was that of a woman or a man, he immediately identified Blanco as the person he had spotted leaving the victim's house (T. 805).

The seminal case regarding the constitutionality of showups is *Neil v. Biggers,* 409 U.S. 188, 93 St.Ct. 375, 34 L.Ed.2d 401 (1972). The *Neil v. Biggers* standard was recently reiterated in *Johnson v. Dugger,* 817 F.2d 726, 729 (11th Cir. 1987):

> Factors considered in determining reliability include "the opportunity to view the witness at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

In essence, the test probes the reliability of the identification.

[3] Although a showup was arguably not the best method to conduct an identification, the "totality of the circumstances" demonstrates that the police "did not aggravate the suggestiveness" of the showup, and therefore, "the confrontation was not impermissible." *Johnson,* 817 F.2d at 729; *See also Manson v. Brathwaite,* 432 U.S. 98, 106, 97 S.Ct. 2243, 2249, 53 L.Ed.2d 140 (1977). Here, the record establishes that Abdeni had sufficient opportunity to observe the person leaving the premises to give a description of the suspect's

form and clothing (T 66-67; 795). Moreover, Abdeni told the police and later, the jury, that he could only recognize the suspect's body form and type of clothing and that Blanco fit both criteria (T. 72-76; 803-809).

Additionally, the jury heard all the evidence and was given the opportunity to disregard that identification or assign less credibility to Abdeni's testimony. The record belies Blanco's argument that trial counsel failed to develop inconsistencies in Abdeni's testimony (T. 799-808; 810-812). Contrary to Blanco's assertion, on cross-examination, defense counsel, Mr. Tenbrook, brought the discrepancies in the identification to the jury's attention, including Abdeni's inability to observe the suspect's head through the trees in front of the victim's house, Abdeni's uncertainty as to the sex of the person, and the overall vagueness of the description (T. 799-808; 810-812).

> [S]uch evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Manson, 432 U.S. at 116, 97 St.Ct. at 2254. Thus, based upon the totality of circumstances in this case, there was no error in admitting this identification testimony.

Based upon the aforementioned findings, Blanco's challenge to the identification testimony of Vezos and Abdeni must be DENIED.

CLAIMS II, III AND IV: AGGRAVATING CIRCUMSTANCES

A. Introduction

Here, three (3) aggravating circumstances regarding the death sentence are at issue:

1. Premeditation;

2. Prior conviction; and

3. Felony murder.

The Supreme Court of Florida has found that, "[when]...there are one or more valid aggravating factors that supports a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty." *Blanco I,* 452 So. 2d at 526. Therefore, should this Court find that there is even one valid aggravating circumstance and no mitigating circumstances, no relief from the death sentence as a result of the impermissible use of an aggravating circumstances can be obtained.

The three aggravating circumstances are discussed below *seriatim.*

CLAIM II: PREMEDITATION

Blanco not only questions whether the factor of premeditation could have been considered in determining his death penalty, he also questions whether it was even used by the trial court. Blanco's uncertainty is understandable. In its opinion on Blanco's direct appeal, the Supreme Court of Florida made, what appear to be contradictory statements regarding the issue of premeditation. On the one hand, the Court expressly held that the premeditation factor was "erroneously applied" because

"there was no showing of heightened premeditation." *Blanco I,* 452 So.2d at 526. However, the Court also stated that, "[Blanco] was indicted for premeditated murder, the jury was instructed on premeditated murder, and the evidence supported premeditated murder." *Blanco I,* 452 So.2d at 525. This confusion is explained below.

In essence, it appears that, as the Supreme Court of Florida interprets this state's death penalty statute, there is a distinction between simple "premeditation" and "heightened premeditation." Here the Court found the existence of the former, but not the latter.

[4] Presuming the aforementioned, mere "premeditation" cannot be used as an aggravating factor when considering the imposition of a death sentence. In *Nibert v. State of Florida,* 508 So.2d 1 (Fla. 1987), the Court stated:

> We have consistently held that application of this aggravating factor required a finding of heightened premeditation; i.e., a cold-blooded intent to kill that is more than contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder.

Nibert, 508 So.2d at 4.

Accordingly, inasmuch as the Supreme Court found no "heightened premeditation," the "premeditation" factor cannot be used in reviewing the criteria to support Blanco's death sentence.

The Florida Supreme Court's interpretation regarding premeditation as an aggravating circumstance was correct. The crime, although horrible as is any murder, does not meet the definition of heightened premeditation established by the Florida courts. The controlling statute delineating the level of premeditation is Fla.Stat.Section 921.141(5)(i). As quoted in *Nibert,* "[t]his aggravating circumstance has been

found when the facts show a *particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator" Niebert,* 508 So.2d at 4. The record establishes that, in this case, there were no such "atrocious" events or "substantial periods of reflection."

[5] Thus, the only certainty regarding premeditation is that it was not a factor which could have been used as an aggravating circumstance for imposing the death penalty upon Blanco. However, as Respondent correctly contends, the Florida Supreme Court's opinion permissibly found that although premeditation was *not* an aggravating circumstance, it could and did find that this murder was "premeditated" for purposes of determining guilt. This Court agrees with Respondent that Florida law allows that the "level of premeditation" necessary to convict in the guilt phase of a first degree murder trial need not rise to the "level of premeditation" required to find an aggravating circumstance. *Preston v. State,* 444 So.2d 939 (Fla. 1984); *Nibert,* 508 So.2d 1. Thus, the Supreme Court's opinion, while not completely clear on this matter, did find premeditation in this last regard. Here too, its decision was correct. Despite Petitioner's protestations to the contrary, viewing the evidence in the light most favorable to the verdict winner, the essential elements of a standard premeditated murder were proven, and done so beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307. 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Accordingly, premeditation as an aggravating circumstance is not a proper consideration here, but under Florida law, could and was found to be the basis of the verdict of guilt.

CLAIM III: PREVIOUS CONVICTION

[6] The trial court considered Blanco's previous conviction for armed *robbery* as an aggravating circumstance supporting the imposition of the death penalty (T.1856). A second conviction for armed *burglary,* contrary to the respondent's contention, was not utilized.[5] The trial court stated,

> [t]hat at the time of the crime for which [Blanco] is to be sentenced, [Blanco] had been previously convicted of another capital offense, or of a felony involving the use of violence to some other person. This aggravating circumstance does apply in this case. The defendant, Omar Blanco, was previously convicted of an armed *robbery.* The defendant, Omar Blanco, was also previously convicted of another crime, an armed *burglary* at the same time he was convicted of the armed *robbery,* however, the Court will not consider the armed *burglary* in this instance as another felony involving the use of violence to some person.

(T. 1856) (emphasis added)

On the date Blanco was sentenced to death, June 21, 1982, Blanco was appealing his conviction for the prior armed

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5 The respondent contends that Blanco's prior burglary conviction should also be considered to substantiate the death penalty. The record, however, could not be clearer that the trial could did *not* use the burglary conviction as an aggravating circumstance, nor did the trial court consider it as another violent felony for the purposes of the sentence (T. 1856). Therefore, the fact that Blanco had this other valid conviction is precluded from consideration because it was expressly excluded by the trial court.

On reconsideration, Respondent contends that it never argued that the burglary was used for the "prior conviction" aggravating factor but rather as an "underlying felony." But *see* Respondent's Supplemental Response to Petition for Writ, p. 41-2. This Court appreciates Respondent's disavowal of this position, as it is erroneous.

robbery which was considered by the trial court as an aggravating factor. On August 11, 1983, the Fourth District Court of Appeal for the State of Florida reversed the trial judges' denial of the motion to suppress and with it, reversed Blanco's previous conviction for armed robbery on Fourth Amendment grounds. *Blanco v. State of Florida,* 438 So.2d 404, 405 (Fla. 4th DCA 1983). That conviction was subsequently reaffirmed upon retrial on March 14, 1984. The Supreme Court of Florida then affirmed Blanco's death sentence on June 7, 1984.

Blanco contends that the prior conviction could not properly be considered at the sentencing hearing because it was subsequently invalidated. Blanco further contends that his subsequent retrial and reconviction for armed robbery are irrelevant to our inquiry here inasmuch as the reconviction was obtained after the sentencing hearing.

Blanco's claim is unique in that it has never been addressed by Florida's courts. However, a similar issue has been considered. In *Peek v. State,* 395 So.2d 492 (Fla. 1980), the Supreme Court of Florida determined that convictions on appeal which were subsequently affirmed "were in fact convictions at the time of sentencing," *Peek,* 395 So.2d at 499. The Court, however, also stated, "[w]e do not have the problem which would arise from the consideration as an aggravating circumstance of a conviction valid at the time of sentencing, that is subsequently reversed and vacated by an appellate court." *Peek,* 395 So.2d at 499. Here, the situation is one contemplated by Florida's Supreme Court, but left unanswered.

Our analysis of this issue begins with the case of *United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). In that case, the United States Supreme Court has held that "if the sentencing judge had known that...the respondent's previous convictions had been unconstitutionally

obtained" the sentence might have been different. *Tucker,* 404 U.S. at 448, 92 S.Ct. at 592 (emphasis added). This is because at "conviction" memorializes and confirms that the defendant did indeed commit the charged criminal act. Accordingly, when considered as an aggravating circumstance, the Florida statute expressly requires that the defendant "was previously *convicted* of...a felony involving the use or threat of violence to the person." Fla.Stat. Section 921.141(5)(b)(1985)(emphasis added).

Blanco's situation is analogous to that in *McCrae v. State of Florida,* 395 So.2d 1145 (Fla. 1981). There, although the defendant had pled guilty to a previous violent felony, the trial court had withheld adjudication of guilt. Thus, there was no "formal conviction" of record. Nevertheless, the Supreme Court of Florida determined that although the trial court withheld adjudication of guilt, there still existed an "unrefuted factual determination that the defendant committed this prior criminal offense." *McCrae,* 395 So.2d at 1154. Here, what Blanco cannot dispute is that his prior violent crime, at the time of sentencing, factually existed. Thus, the act of the armed robbery was properly considered by the trial court, even if it was unaware of the infirmity in the initial conviction, because upon retrial, the fact that Blanco indeed had committed the crime was reaffirmed.

Blanco relies upon *Johnson v. Mississippi,* ___U.S.___, 108 S.Ct. 1981, 100 L.Ed. 2d 575 (1988) as support for his proposition that the trial court would have reviewed Blanco's sentence differently in light of the prior unconstitutional conviction. At the time of this Court's original decision, *Johnson* had still not been decided by the United States Supreme Court. This Court, however, distinguished *Johnson* on the grounds that "*Johnson,* unlike the instant case, involved a conviction which was *completely* invalidated and *not* reinstated." The Supreme Court's decision affirms this Court's earlier determination. As Mr. Justice Stevens

stated, "[s]ince the conviction has been reversed, *unless and until petitioner should be retried,* he must be presumed innocent." *Johnson,* 108 S.Ct. at 1986. Here, Blanco has not only been retried, but also reconvicted and the second conviction has been affirmed on appeal. Thus, unlike *Johnson,* here the jury was not allowed to consider evidence that is "materially inaccurate." *Johnson,* 108 S.Ct. at 1989.

Blanco also contends that when the Supreme Court of Florida refused to remand this case to the trial court for resentencing based upon the newly obtained and constitutionally valid armed robbery conviction, it improperly acted as a sentencer and over-stepped its bounds as an appellate court. This contention elevates form over substance. The Supreme Court of Florida recognized that remand on this issue was pointless and a waste of scarce judicial resources. In this case, on remand, there would be nothing new for the trial court to consider. As the infirmity in the first armed robbery conviction was cured, there was no harm presented by the Supreme Court of Florida deciding the obvious. The Supreme Court of Florida simply reviewed the prior conviction in the same light as the trial court originally had because by the time the appellate review of this matter took place, Blanco had been reconvicted. Indeed, the concurring opinion of Mr. Justice White in *Johnson* confirms this view. As Justice White stated:

> It is left to the Mississippi Supreme Court to decide whether a new sentencing hearing must be held or whether that Court should itself impose the appropriate sentence...*Cf. Cabana v. Bullock,* 474 U.S. 376 [106 S.Ct. 689, 88 L.Ed.2d 704](1986).

Johnson, 108 S.Ct. at 1989 (White, J., concurring).

In any event, because of this Court's resolution of issues XIII, XIV and XV, *infra,* Blanco's complaint that the jury has

not had the opportunity to review the constitutionally obtained conviction, will be rendered moot.

Based upon the law and facts in this case, the use of the prior violent robbery conviction as an aggravating circumstance was proper.

CLAIM IV: FELONY-MURDER AS AN AGGRAVATING CIRCUMSTANCE

Blanco was sentenced to death based upon two aggravating factors. One was the prior conviction, discussed in Claim III, *supra,* and the other was that the murder was committed while Blanco was engaged in the commission of a burglary (T. 1856-1857). Blanco claims that the use of the underlying felony as an aggravating circumstance for imposing the death penalty is error because it constitutes an impermissible "automatic" finding of an aggravating factor.

[7] Initially, respondent argues that this claim is procedurally barred as neither Blanco's trial nor appellate counsel raised this issue in their respective forums. However, even if this issue has never been addressed, Blanco is correct that it may have been ineffective for previous counsel to have avoided this legal question and, therefore, this Court will discuss the merits of the claim.

[8] There are two Florida statutes which must be analyzed in the context of whether the death sentence is the proper penalty for the crime of felony-murder. The first is Fla.Stat. Section 782.04(1984) which defines first degree murder as:

> (1)(a) The unlawful killing of a human being:
>
> * * *
>
> (2) When committed by a person engaged in the preparation of, or in the attempt to perpetrate, any:

* * *

e. Burglary,...

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Fla.Stat. Section 775.082(1983), then refers to the second critical statute at issue, Section 921.141, entitled, "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence". That section lists nine possible aggravating circumstances and seven possible mitigating circumstances. The aggravating circumstance at issue states:

(5):...(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary,...

The United States Supreme Court has recently addressed the issue of whether the finding of a "single aggravating circumstance" which "merely duplicates an element of the underlying offense of first-degree murder," violates the Eighth Amendment of the United States Constitution. *Lowenfield v. Phelps,* ___U.S.___, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). In *Lowenfield,* the Court analyzed the Louisiana capital punishment scheme and stated the test for determining the question at hand:

To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

Lowenfield, 108 S.Ct. at 554, *citing Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); *cf. Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In other words, the finding that an aggravating circumstance exists is simply the first step in the determinative process which weans out those defendants whom the legislature has previously determined are not a part of a class of convicted murderers who should be punished by this state's most severe and final sentence.

The United States Supreme Court has concluded, "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make [the] sentence constitutionally inform." *Lowenfield,* 108 S.Ct. at 555. As in *Lowenfield,* the Florida death penalty statute, although in a different manner, narrows the class of death-eligible murders by permitting, at the sentencing phase, the consideration of mitigating circumstances and the exercise of discretion. As the United States Supreme Court has stated,. "[t]he Constitution requires no more." *Lowenfield,* 108 S.Ct. at 555.

Blanco's attempt to apply *Lowenfield* to obtain relief is not persuasive. Blanco reads *Lowenfield* to stand for the proposition that an aggravating factor can be considered at *either* the conviction stage, as in Texas and Louisiana, *or* the sentencing phase, as in Georgia but not both. However, the *Lowenfield* Court's comparison of the various state death penalty schemes was not so mechanical. The Court's opinion does not forbid the existence of duplicate factors in both stages, but rather directs that the statutory scheme be studied to determine whether it produces the constitutionally required narrowing effect.

It is now settled that Florida's death penalty statute is constitutional. In *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme

Court stated that "Florida,...has...enact[ed] legislation that passes constitutional muster...[T]his system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt,* 428 U.S. at 259-260, 96 S.Ct. at 2970, *citing Furman v. Georgia,* 408 U.S. 238, 310, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346 (1972). In the same regard,

> [t]he Florida capital-sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."

Proffitt, 428 U.S. at 253, 96 S.Ct. at 2967.

Here, Blanco fails to take into account that even if he was convicted of a murder without consideration of the underlying felony, the underlying felony would still exist as a factor which narrows the class and which, to Blanco's detriment, he still belongs. In other words, Blanco is not entitled to an automatic exclusion from the class of death-sentence qualified convicts if the factors which apply to him happen to overlap. The test is whether the statutory scheme is

constitutionally appropriate, no more, no less.[6] Therefore, Blanco's challenge to consideration of felony-murder as an aggravating factor cannot succeed.

B. Aggravating Circumstances: Conclusion

In brief, the Florida statutory scheme does not *mandate* the imposition of the death penalty under any circumstance. The statute provides a balancing test where any aggravating circumstances are weighed against any mitigating factors. In this case, although Blanco is correct that premeditation was not and cannot be utilized as an aggravating circumstance, because two other aggravating factors were validly considered, those being the previous commission of an armed robbery and the underlying felony of armed burglary, together with the fact that there was no finding of mitigating circumstances, compels the conclusion

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6 This Court finds that Blanco's citation to *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) to support Claim IV is misplaced. In affirming the imposition of the death penalty in *Tison*, the United States Supreme Court distinguished that case from *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 4468, 73 L.Ed.2d 1140 (1986). In *Enmund*, the defendant was the driver of a "getaway car" and did not take part in the actual murder. The Court, in vacating the death sentence, found that Enmund's participation in the felony murder was so attenuated...[that] (citation omitted) the death penalty was excessive retribution for his crimes." *Tison*, 107 S.Ct. at 1683-1684. In *Tison*, however, the defendants' "degree of participation in the crimes was major rather than minor." *Tison*, 107 S.Ct. at 1684. Here, Blanco was the person who pulled the trigger seven times and killed the victim. Certainly, Blanco's situation is more analogous to that in *Tison* than in *Enmund*. The Court in *Tison* explained:

> This substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances.

Tison, 107 S.Ct. at 1686. Accordingly, contrary to Blanco's contention, *Tison* supports the imposition of the death penalty here.

that Blanco's challenge to his death sentence based upon an improper application of Florida's death penalty statute is DENIED.

CLAIM V: SUFFICIENCY OF EVIDENCE

Blanco, styling this claim as one which implicates the sufficiency of the evidence, maintains that his conviction could only be valid if the verdict was predicated upon the jury finding of *both* premeditated murder and felony murder. For this argument, Blanco relies upon *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), a freedom of speech case for the proposition that, "[i]f *either* basis was unconstitutional, the conviction cannot stand."

Blanco has taken *Stromberg* completely out of context. In *Stromberg,* the Court held that one of the clauses in a California statute, which made displaying a red flag as an emblem of opposition to organized government a criminal act, was invalid. Therefore, the conviction required reversal. Here, however, Florida's statutory scheme is constitutional. *See Proffitt,* 428 U.S. 242,96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), *supra.* Although this Court finds that no premeditation as an aggravating factor existed, as did the Supreme Court of Florida, the lack of premeditation as an aggravating factor does not in any manner circumscribe the weight of the evidence produced at trial to support the conviction, nor does it preclude a finding of premeditated murder. *See* discussion of Claim III, *supra.*

The standard used to determine whether the evidence was sufficient to support a conviction is well-settled in the Eleventh Circuit:

> 'It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of

> guilt, provided a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of evidence.' In making this determination, we must view the evidence in the light most favorable to the government, (citation omitted) and accept reasonable inferences and credibility choices by the fact-finder. *United States v. Gonzalez,* 719 F.2d 1516, 1521-22 (11th Cir. 1983).

United States v. Rosenthal, 793 F.2d 1214, 1225 (11th. Cir. 1986), *cert. denied,* ___U.S.___, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987).

[9] Here, the evidence against Blanco included the identification of Blanco by eyewitness Thalia Vezos, Blanco's driver's license and wallet which were found in the victim's home, the BOLO supplied by Vezos which substantially matched Blanco's description, the identification by Abdeni, and the fact that Blanco was found near the scene of the crime. In light of these facts, Blanco's conviction is amply supported by the record and therefore Claim V is DENIED.

CLAIM VI: ADMISSION OF STATEMENTS

Blanco's next claim is twofold. First, he contends his arrest was illegal. Therefore, any statements obtained from him as a result of that arrest, should not have been introduced at trial. Second, Blanco maintains that, even assuming his arrest was legal, the statements were still excludable because they were obtained in violation of his *Miranda* rights. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The statements at issue are (1) Blanco's remark to the police that he had left his wallet and identification at home; and (2) Blanco's alleged comment to a police officer

that he regularly rode his bicycle to the Fort Lauderdale area and then ran several miles along the beach (T 1436-37).

[10] This Court reaffirms its previous finding that the BOLO supplied sufficient probable cause, therefore, Blanco's arrest was valid. (*See* discussion in Claim I, *supra*). Accordingly, Blanco's first argument fails.

[11] However, Blanco is correct that after he was arrested he was interrogated without receiving the appropriate Miranda warnings (T 177). The trial judge did suppress these statements but, specifically determined that because Blanco's statements were voluntary, they were admissible for impeachment purposes (T 177).[7] The statements were not introduced in the state's case-in-chief, but were used only after Blanco took the stand in his defense for the purpose of impeaching his credibility.

This Court's analysis begins and ends with *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), where the United States Supreme Court addressed the precise issue at hand, that is, whether a statement made by a suspect to the "police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona,* (citation omitted) may...be used to impeach his credibility." *Harris,* 401 U.S. at 222, 91 S.Ct. at 644. The Court answered in the affirmative and found that admission of the statement for impeachment purposes was proper. The Court reasoned:

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7 In making this determination during the suppression hearing, the trial court properly inquired into the issue of voluntariness pursuant to *Jackson v.Denno,* 378 U.S. 368, 84 St.Ct. 1774, 12 L.Ed.2d 908 (1954), "In *Jackson v. Denno*..., the Supreme Court held that, when a defendant objects to the introduction of his statement as involuntary, due process requires a trial judge to make an independent determination that the statement is voluntary before permitting it to be heard by the jury." *Miller v. Dugger,* 838 F.2d 1530, 1535 (11th Cir. 1988).

> Petitioner's testimony is his own behalf concerning the events of [the night of the crime] contrasted sharply with what he told police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Harris v. New York, 401 U.S. at 225, 91 S.Ct. at 645.

Although Blanco disputes the trial court's finding that the statements were voluntary, the evidence supports that decision, which was subsequently upheld by the Supreme Court of Florida. *Blanco I,* 452 So.2d at 524. Officer Perez-Cubas testified that he did not threaten, make promises or physically touch Blanco (T.109). The officer testified that after Blanco was taken to the homicide scene, Blanco was questioned only as to what he was doing in the area (T. 107-108). Blanco was subsequently taken to the police station and was read his *Miranda* rights (T.111). Officer Perez-Cubas interpreted each of the rights in Spanish to which Blanco answered that he understood his rights (T. 114). Officer Perez-Cubas described Blanco's attitude during all questioning as "very relaxed" and Blanco answered the inquiry regarding his wallet without hesitation (T 115).

At the police station, Blanco requested to speak to an attorney. Notwithstanding this request, the officers showed him a purse, wallet and driver's license and asked Blanco

whether he recognized those items (T 114-115). Blanco answered that those were his belongings but thought "he left his possessions and driver's license back in his apartment" (T 114; 1438).

During direct examination, Blanco contradicted the officer's statement and instead, testified that he had lost his "purse," which contained his driver's license, and believed that he had left those items at his friend's home (T 1425-1426).[8] On cross examination, the State was permitted to question Blanco as to the whereabouts of his wallet and driver's license (T.1437-1439). Blanco denied that he had made the statements in question or that the officer had even asked him about the location of the wallet and identification (T 1438-1439).

Although Blanco's right to terminate questioning should have been honored when he requested an attorney, "the *Miranda* opinion does not create a *per se* proscription of any further interrogation." *Michigan v. Mosley,* 423 U.S. 96, 103, n.9, 96 S.Ct. 321, 326 n.9, 46 L.Ed.2d 313 (1975). "The question whether a confession was voluntarily made necessarily turns on the 'totality of the circumstances.'" *Boulden v. Holman,* 394 U.S. 478, 480, 89 S.Ct. 1138, 1140,22 L.Ed.2d 433 (1969). A trial "court's determination that a statement was voluntary [should not be 'upset'] unless clearly erroneous." *United States v. DeParias,* 805 F.2d 1447, 1456 (11th Cir.1986), *citing United States v. Beck,* 729 F.2d 1329,1333 (11th. Cir. 1984), *cert. denied,* 469 U.S. 981, 105 S.Ct. 383, 83 L.Ed.2d 318 (1984).

With this standard in mind, this Court has carefully reviewed the record, including the transcript of the suppres-

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8 There was some confusion as to whether Blanco was referring to a "purse" or to a "wallet" (T. 1422-1424) but it seems as though Blanco only identified the *wallet,* not the purse in which the wallet was found (T. 1424).

sion hearing, the testimony by Officer Perez-Cubas and the cross examination of Blanco. After "an independent study of the entire record," this Court finds that the trial court was correct in determining that Blanco's statements were voluntary. *Boulden,* 394 U.S. at 480, 89 S.Ct. at 1140. The statements were not coerced, and did not amount to a "confession," as Blanco did not admit to killing the victim, nor did he admit he had anything to do with the murder. Here, as in *DeParias,* the record does "not [indiate] any untoward pressure or unfair tactic." *DeParias,* 805 F.2d at 1456. Based upon these facts, this claim is DENIED.

CLAIM VII: INSTRUCTION TO JURY REGARDING NUMBER OF JURORS NEEDED TO RETURN A LIFE SENTENCE

[12] Blanco contends that the jury was improperly instructed that a majority was needed to return a sentence of life imprisonment. The correct statement of the law in Florida is that a tie among the jurors will result in the imposition of a life, rather than a death sentence.

The Eleventh Circuit has addressed this exact issue in *Henry v. Wainwright,* 743 F.2d 761 (11th. Cir. 1984). In *Henry,* the jury was instructed that "seven or more of you must agree upon the recommendation you submit to this Court." *Henry,* 743 F.2d at 763. As here, the defendant in *Henry* failed to make a contemporaneous objection at trial required by Florida case law. *Ford v. Wainwright,* 451 So.2d 471, 475 (Fla. 1984).[9] The jury in *Henry* returned a recommendation of death by a 7-5 vote. The defendant in *Henry*

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9 The issue of what a trial court should do in the event of an even division among the jurors in the sentencing phase of a death case was not addressed by the Supreme Court of Florida until after the sentencing of both the defendants in *Henry* and *Blanco. Rose v.State,* 425 So.2d 521 (Fla. 1983).

failed to proffer any evidence or point to anything in the record that would suggest that the jury was, in fact, ever equally divided in its deliberations, thereby rendering the claim a "remote" possibility which could not afford any relief.

Here, the jury's recommendation, by an 8-4 majority, was that the death sentence be imposed. As in *Henry,* Blanco has not supported his claim with any evidence or shown that any part of the record would demonstrate that the jury was ever evenly divided.[10] Therefore, as in Henry, this claim must be DENIED.

CLAIM VIII: PROSECUTOR'S CLOSING ARGUMENT AT SENTENCING

[13] Blanco claims that the prosecutor injected inflammatory remarks into his closing argument at sentencing which prejudiced the jury's recommendation.[11] The remarks at issue referred to the victim, John Ryan, and his family, particularly, a comparison between Blanco and the victim by the prosecutor, stating:

> There was (sic) two people that were complete strangers, and it didn't matter who John Ryan was. The only thing we know about John Ryan from the testimony at trial is that he wasn't born in this country, either. He was born in Ireland, and

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10 This claim was not raised on direct appeal and was rejected on procedural grounds in *Blanco II.* However, as the issue is to directly controlled by Henry, this Court sees no purpose to deny Blanco the knowledge that his claim is simply not meritorious.

11 The Supreme Court of Florida found that this claim was procedurally barred and did not address the merits. *Blanco II,* 507 So.2d at 1380. In light of the recent case *Booth v. Maryland,* ___U.S.___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), *reh'g. denied,* ___U.S.___, 108 S.Ct. 31, 97 L.Ed.2d 820 (1987), this Court will address the merits.

that (sic) he was a loving uncle, and he was an asset to the community.

(T. 1829).

Blanco argues that the above-referenced portion of the prosecutor's sentencing argument prejudicially contrasted "good immigrants" against "bad Marielitos."[12] Blanco relies upon the case of *Booth v. Maryland,* ___U.S.___, 1207 S.Ct. 2529, 96 L.Ed.2d 440 (1987), *reh'g denied,* ___U.S.___, 108 S.Ct. 31, 97 L.Ed.2d 820 (1987), for the proposition that the attributes of the victim are irrelevant to the sentencing determination.

In *Booth,* the prosecution at sentencing introduced "a victim impact statement (VIS), describing the effect of the crime on the victim and his family." *Booth,* 107 S.Ct. at 2531. The VIS focused extensively on "the emotional trauma suffered by the family and the personal characteristics of the victim." *Booth,* 107 S.Ct. at 2533. Presentation of the VIS resulted in "[t]he prospect of a 'mini-trial' on the victim's character." *Booth,* 107 S.Ct. at 2535. Here, in contrast, the prosecutor's main focus in closing argument at sentencing was on Blanco's crime and the statutory reasons for imposing the death penalty (T. 1830-1833).

In reviewing a sentencing argument, this Court must determine whether the argument was "so prejudicial, when viewed in the context of the entire sentencing proceeding, as to have renered that proceeding 'fundamentally unfair.'" *Johnson v. Wainwright,* 778 F.2d 623, 630 (11th Cir. 1985), *citing Brooks v. Kemp,* 762 F.2d 1383 (11th Cir. 1985), *vacated on other grounds,* 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986); and *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct.1868, 40 L.Ed. 2d 431 (1974). Here, the com-

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12 The prosecution did not explicitly use the term "Marielito" or make any such reference during closing argument at sentencing.

ments by the prosecutor were minimal and in no manner compared to the VIS submitted in *Booth*. Further, the Court in *Booth* narrowed its holding to similar situations and realized that such comments are not always cause for reversible error.

> Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context.
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> * * *
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> The trial judge, of course, continued to have the primary responsibility for deciding when this information is sufficiently relevant to some legitimate consideration to be admissible, and when its probative value outweights any prejudicial effect. *Cf.* Fed.R.Evid.403.

Booth, 107 S.Ct. at 2535 n. 10.

Based upon a review of the entire sentencing argument, this Court finds that the prosecutor's comments did not rise to the level of a *Booth* claim, and therefore, this claim is DENIED.

CLAIMS IX, X, XI, XII, XIII AND XIV: INEFFECTIVE ASSISTANCE OF COUNSEL

Claims IX through XIV raise issues and facts which Blanco contends demonstrated that his two trial attorneys, Carlos Rodriguez and Don Tenbrook, provided ineffective assistance of counsel in violation of his Sixth Amendment rights. This Court, on January 4-5, 1988, held a full evidentiary hearing on all of these claims. (Citations to the transcript of proceedings before this Court will be designated with the letter "D.")

[14] The claim must be judged by the same test, and therefore, an overview of the law is appropriate. The United States Supreme Court set standards for determining whether "a conviction or death sentence should be set aside because counsel's assistance at the trial or sentencing was ineffective" in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court developed a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In reviewing "a federal habeas challenge to a state criminal judgment, [the issue of ineffectiveness of counsel is a] mixed [question] of law and fact." *Strickland,* 466 U.S. at 698, 104 S.Ct. at 2070. Additionally, both parts of the *Strickland* test need not be analyzed "if the defendant makes an insufficient showing on one." *Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct to underminded the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686, 104 S.Ct. at 2063.

At this juncture, this Court will discuss the facts of each ineffective assistance of counsel claim.

CLAIM, IX: PROCEEDINGS CONDUCTED IN THE ABSENCE OF BLANCO AND AN INTERPRETER

A. Blanco's Absence

[15] Blanco cites to several instances during his pre-trial and trial proceedings when he was not present in the courtroom. All of the incidents occurred outside the presence of the jury and all the discussions pertained to legal matters. Further, at these times, the defense counsel either waived Blanco's presence or did not object to his absence.

This claim was raised and addressed in *Blanco I* and *Blanco II*. The Supreme Court of Florida determined that this claim was procedurally barred in *Blanco II*. However, this Court considered evidence regarding this claim at the evidentiary hearing it conducted, accordingly, the merits will be addressed. Based on the evidence presented and a thorough review of the trial transcript, this Court finds that, on the merits, the cited incidents where Blanco was absent from the courtroom, were simply "not...critical [s]tages of the trial proceedings." *United States v. Vasquez*, 732 F.2d 846, 849 (11th. Cir. 1984), and therefore, this claim is DENIED.

B. Interpreter's Absence

[16] Prior to trial, defense counsel requested the presence of an interpreter. At various times throughout the proceedings, however, an interpreter was not, in fact, in the courtroom. During those times, co-defense counsel, Mr. Rodriguez, although not literally, translated all or most of the proceedings. This claim was not raised in *Blanco I*, but was raised in *Blanco II*. Although the Supreme Court of

Florida found that the claim was procedurally barred and not "cognizable on collateral review", it briefly discussed the merits. *Blanco II,* 507 So.2d at 1380. The Court in *Blanco II* relied upon its opinion in *Suarez v. State,* 481 So.2d 1201 (Fla. 1985), where the Court confirmed that, [t]hough the Court must afford the defendant full opportunity to obtain all the benefit of this constitutional right [to confront witnesses] and, to that end, to understand testimony of the witnesses against him, so that a proper cross-examination may be hand, we know of no affirmative duty developing on the court to see that the defendant does have interpreted to him everything that is said and done, as it occurs, during the progress of the trial. The court in this case surely performed its full duty of preserving to the defendant his rights in that regard by appointing the interpreter selected by the defendant, an interpreter who was admittedly competent, and who was appointed for the declared purpose of interpreting and explaining to the defendant all of the things said and done during the trial. *Suarez,* 481 So.2d at 1204. This Court agrees with the Supreme Court of Florida that this claim is both procedurally barred as well as lacking merit.

Blanco's counsel fulfilled their obligation by requesting an interpreter. Further, even if counsel were in error by failing to ensure that an interpreter was present at every stage of the proceedings, "setting aside the judgment [of the trial court is not warranted] if the error had no effect on the judgment." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Here, whatever gaps in interpreting may have occurred

were at noncritical stages in the proceedings and therefore, any error was harmless. Thus, this claim too, is DENIED.[13]

CLAIM X: BLANCO'S COMPETENCY TO STAND TRIAL

[17] This Court held an extensive evidentiary hearing on Blanco's mental competency and whether his counsel were ineffective for failing to raise this as an issue at the trial and sentencing stages. The Supreme Court of Florida rejected this claim in *Blanco II* stating:

> [T]he record shows that trial counsel considered obtaining a psychiatric examination, but with [Blanco's] concurrence, decided not to do so because [Blanco] gave every appearance of competency and a theory of incompetency would dilute [Blanco's] strategy of denying guilt.

Blanco II, 507 So.2d at 1383.

Blanco bases his claim that he was incompetent to stand trial on his alleged "organic brain damage" and his inability, as a Mariel refugee, to appreciate the differences between the Cuban and American justice systems. At the evidentiary hearing before this Court, Blanco presented the testimony of two witnesses to substantiate his claim.

The first witness, Dr. Harry Krop, a clinical psychologist, developed an opinion as to Blanco's competency without examining Blanco (D. 143). Dr. Krop's evaluation resulted from reviewing the trial transcript, interviewing Blanco's

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13 Certainly, imposing upon counsel to both defend and interpret is not the preferred method of providing a translation of the proceedings, and, in the appropriate circumstances might raise questions of depriving counsel the ability to effectively represent his client. But here, these gaps were minimal.

brother and reading some other related materials. (D. 144). Dr. Krop did not, however, consider the psychological profile done by the Department of Corrections, nor did he have any direct contact with Blanco or his trial attorneys. (D. 165-173). After considering the information, Dr. Krop determined that Blanco's "competency certainly was questionable" (D. 160). In brief, this Court is not persuaded that Dr. Krop's incomplete evaluation supports Blanco's claim.

Blanco's next witness was Dr. Dorita Marina, a clinical psychologist and psychoanalyst, with experience in handling cultural and psychological problems of Mariel refugees. Dr. Marina devoted a large amount of time to evaluating Blanco's mental competency, including interviewing Blanco and administering psychological tests for over four hours, speaking to Blanco's brother for about one-half hour, and reviewing the trial transcript and psychological reports by other doctors regarding Blanco's condition. Based predominantly on her analysis of Blanco's test results, Dr. Marina diagnosed Blanco as suffering "from a bipolar disorder mixed with psychotic features" (D. 183).

This diagnosis, however, was based upon a description in an outdated edition of a manual called **Diagnostic and Statistical Manual of Mental Disorders** (D. 261). Moreover, throughout the course of questioning at the evidentiary hearing, Dr. Marina made several contradictory statements and was forced to reassess her conclusions. For example, Dr. Marina testified on direct examination that Blanco's test results showed no indication of any violent tendencies (D. 215). On cross-examination, however, Dr. Marina admitted to being unaware that Blanco had been previously convicted of a violent felony and upon learning of this information, she changed her conclusion stating, "I think that that (sic) would have meant that there is a tendency for impulsive behavior which can be of an aggressive nature" (D. 274). Given the inconsistencies in Dr. Marina's

testimony, this Court was not convinced that her testimony was credible.

In light of the above discussion, it is apparent that there can be no basis to support a claim of ineffective assistance because Blanco has failed to establish that he was, in fact, at the time of trial, incompetent. Moreover, an examination of the record highlights the invalidity of this claim. Blanco's counsel, Mr. Rodriguez, testified that he had no reason to believe Blanco was incompetent (SCP. 441). Mr. Rodriguez and Blanco were able to communicate about the case and counsel's trial strategy (SCP. 408-11). The breakdown in communication occurred, not because of a lack of mental competency, but because Blanco simply disagreed with his counsel as to which witnesses should be called (D. 87-91; 122).

The Eleventh Circuit recently addressed the issue of whether an attorney is ineffective for failing to obtain a psychiatric examination. In *Daugherty v. Dugger,* 839 F.2d 1426 (11th Cir. 1988), the Court stated:

> Where...the defendant himself gives counsel reason to believe that further investigation of the defendant's mental condition would be useless or even harmful to the defense, then the decision not to further investigate is reasonable. *Strickland,* 466 U.S. at 691 [104 S.Ct. at 2066].

Daugherty, 839 F.2d at 1431.

Here, the evidence clearly supports a finding that Blanco's counsel were absolutely reasonable in deciding not to put on psychiatric testimony. The evidence presented by Blanco was simply not believable. Similarly, Blanco's request on reconsideration that a second evidentiary hearing be permitted to present more evidence on this issue is rejected. The evidence Petitioner now seeks to submit could have, but was not, presented at the first hearing. As stated above,

Blanco cannot now obtain yet another bite at the apple. Somewhere the process must end. Accordingly, Claim X is DENIED.

CLAIM XI: INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Blanco maintains that he was denied a meaningful and individualized sentencing determination based upon his counsel's alleged failure to (1) investigate Blanco's family history; (2) present information on the "Mariel" plight; and (3) present a psychiatric or psychological evaluation. The merits of this claim were exhaustively considered and denied on motion for post-conviction relief at the trial level and again in *Blanco II,* 507 So.2d at 1381-83. Additionally, this Court heard evidence and considered proffers by counsel regarding this claim.

[18] Blanco asserts that his trial counsel failed to adequately investigate his family background to establish a claim of mitigation, thereby rendering counsels' assistance ineffective. The record reveals that Blanco himself failed to communicate to his counsel that he had family and friends available. *Blanco II,* 507 So.2d at 1382. More crucial to this analysis, however, is the strategy behind counsels' decision not to pursue such testimony. The evidence gathered by Blanco's present counsel reveals Blanco's numerous encounters with the police in Cuba. This fact would undoubtedly have been brought out at sentencing upon questioning Blanco's family members. The record further belies Blanco's contention that his counsel conducted no investigation. Counsel tried to reach Blanco's brother and friends numerous times to no avail (D. 43-44; 70-72).

[19] Applying the standard enunciated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court recently ad-

dressed the issue of whether failure to investigate a petitioner's background for mitigating circumstances constitute ineffective assistance of counsel. *Burger v. Kemp,* ___,U.S.___, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). The Court in Burger restated *Strickland's* standards.

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful to conclude that a particular act omission of counsel was unreasonable. (Citation omitted). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Burger, 107 S.Ct. at 3123, *citing Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Based upon the fact that Blanco's brother failed to aid counsel at trial, despite attempts to reach him, along with the harmful information about Blanco's criminal history in Cuba, lead to the conclusion that trial counsel's investigation into Blanco's background was adequate. *Burger,* 107 S.Ct. at 3126. Indeed, even if, with hindsight, counsels' conduct could be seen as deficient, in view of all the evidence presented, Blanco has failed to demonstrate with any certainty that the presentation of family background information would have changed the outcome at sentencing. *See Elledge v. Dugger,* 823 F.2d 1439 (11th Cir. 1987), *modified on other grounds,* 833 F.2d 250 (11th. Cir. 1987); *Lightbourne v. Dugger,* 829 F.2d 1012 (11th Cir. 1987); *Thompson v. Wainwright,* 787 F.2d 1447 (11th Cir. 1986), *cert. denied,* ___U.S.___,107 S.Ct. 1986, 95 L.Ed.2d 825 (1987), *reh'g denied,* ___U.S.___,107 S.Ct. 3247, 97 L.Ed.2d

751 (1987); and *Mitchell v. Kemp,* 762 F.2d 886 (11th Cir. 1986), *cert. denied,* ___U.S.___, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987).

[20] Blanco next claims that counsel was ineffective for failing to present any information at sentencing in an attempt to disprove the "Marielito myth." Although prejudice may have been abundant in South Florida during the time of Blanco's trial, his counsel's strategy was precisely geared toward minimizing attention to Blanco's cultural background (SCP. 413-14). Counsel believed that any mention to Blanco's Mariel status above that which was absolutely necessary, would be harmful to the case (SCP. 413-14). The evidence, in any event, does not support Blanco's assertion that the jury was not impartial. *Blanco II,* 507 So.2d at 1381-82. This Court, therefore, finds that counsel met the standards in *Strickland* and were not ineffective.

Finally, Blanco again raises counsel's failure to present evidence of Blanco's mental capacity at the sentencing stage. This Court has extensively discussed the reasons why this claim lacks merit (*see* Claim X, *supra*). Therefore, counsel were not ineffective for failing to present a psychiatric or psychological evaluation at sentencing.

Based upon the foregoing analysis, this claim is DENIED.

CLAIM XII: TRIAL COURT DIRECTIONS TO BLANCO'S COUNSEL REGARDING PRESENTATION OF DEFENSE CASE

Blanco's attorneys at the trial and sentencing phases were publicly appointed to represent Blanco. Blanco initially agreed to this representation and both counsel, Mr. Rodriguez ad Mr. Tenbrook, conducted themselves without any *pro se* representations by Blanco until the defense's

case-in chief was presented (D. 87).[14] At that time, a disagreement between Blanco and his counsel arose because the attorneys did not want to call certain witnesses. Defense counsel had determined that the possible testimony would conflict with Blanco's or in other ways disprove Blanco's defense (d. 50).

In essence, defense counsel had planned to present an alibi defense, claiming that Blanco could not have been the person who dropped his wallet at the murder scene on the night in question because he had lost his wallet, which contained his identification, days before the crime occurred (D. 40). As discovery progressed, however, counsel determined that any possible alibi witnesses might present conflicting testimony, and therefore, felt it was in Blanco's best interest to refrain from calling those witnesses (T. 1457-1463).

Blanco, on the other hand, strongly believed that those witnesses would provide beneficial information to his case (D. 53). Blanco became particularly upset upon learning that defense counsel's efforts to serve a desired witness with a subpoena was unsuccessful and filed a pro se motion requesting that he be afforded substitute counsel (D. 523; T. 1459-60; 1962). The trial judge denied the motion, but ordered defense counsel to locate Blanco's requested witnesses and present their testimony (D. 53; T. 1467-69).

Upon the judge's order that the witnesses in question be called, both defense counsel moved to withdraw (T. 1469). That motion, which was previously asserted and denied along with Blanco's motion to change counsel, was again denied (T. 1469).

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14 The transcript of the evidentiary hearing before this Court on January 4-5, 1988, is designated as "D" of district court proceedings.

The presentation of Blanco's defense at trial raises unique questions regarding a trial judge's interference in a defense counsel's trial strategy. The law in this circuit is quite clear that, "[a] lawyer must be able to determine questions of strategy during trial, and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right to effective assistance of counsel, his decision regarding trial strategy must be binding." *Coco v. United States,* 569 F.2d 367, 371 (5th Cir. 1978), *citing United States ex rel. Cruz v. LaVallee,* 448 F.2d 671, 679 (2d Cir. 1971), *cert. denied,* 406 U.S. 958, 92 S.Ct. 2064, 32 L.Ed.2d 345 (1972). "Here, Blanco's present attorney's argument is not that counsel was ineffective for not presenting the requested witnesses, but rather that the Court created an unfair trial because of its interference with defense counsel's strategy.[15]

[21] This Court finds that both defense counsel prepared their trial strategy and determined through interviewing possible witnesses and investigating Blanco's alibi story, that Blanco's case would be hurt rather than helped by presentation of those witnesses. However, the trial judge allowed Blanco's wishes to preempt his counsel's trial strategy. The court's conduct led to the presentation of two witnesses, over the strong objection of counsel (T. 1467-69).

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15 Although Blanco's present counsel argues that the trial court's conduct rendered trial counsel "ineffective," this issue is not, should not, and will not, be addressed as an ineffective assistance of counsel claim. Instead, as it must, this Court will address this issue as to whether the trial court's conduct constituted reversible error. This question was answered in the negative in *Blanco I* and *Blanco II,* but, after conducting a full evidentiary hearing, this Court is not convinced that those rulings, as they pertain to this issue, were correct. Respondent's argument on reconsideration that the trial court "did not direct the defense but rather only enforced Petitioner's rights under the Sixth Amendment" is, under the facts presented in this record, a position which wholly ignores the reality of what transpired in the courtroom at trial.

The testimony of the two witnesses, which defense counsel knew to be conflicting, was presented because of Blanco's belief that the jury could determine "if the [the witnesses] are telling the truth or to see if I'm lying" (T. 1477-79). Despite Blanco's obvious confusion regarding the evidentiary process, the trial court insisted that those witnesses be placed on the stand.

A trial judge is given wide discretion in conducting a trial. There are limits, however, which, if exceeded, can hamper a defendant's right to a constitutionally valid trial. The Eleventh Circuit has described the accepted standard for gauging a judge's trial conduct:

> A trial judge is,...more than a mere moderator and is under a duty to question witnesses and comment on evidence when it appears necessary.
>
> * * *
>
> On the other hand, a trial judge improperly interjects himself into the trial by questioning witnesses when the attorneys are completely conducting their cases.

United States v. Block, 755 F.2d 770, 775 (11th. Cir. 1985). Here, the trial court went beyond merely "questioning" witnesses, but actually called witnesses over and above the objection of counsel, thereby impermissibly interfering with their considered trial strategy. "A trial judge ought not comment to a criminal defendant about the pros and cons of calling each witness. Trial strategy is for the defendant's counsel, guided by consultation with his client." *Moore v. United States,* 598 F.2d 439, 445 (5th Cir. 1979). Despite the Court's "compassion" for defendant's unhappiness with his counsel's strategy, the Court went beyond these "reasonable limits" and, ironically, in an attempt to protect Blanco's right to a fair trial, could have created one which was unfair.

United States v. Bertram, 805 F.2d 1524, 1529 (11th. Cir. 1986).

This interference was not adequately addressed by either the direct or the collateral appellate opinions. In addressing this issue on the direct appeal, the Supreme Court of Florida relied on *Milligan v. State,* 177 So.2d 75 (Fla. 2d DCA 1965) for the proposition that "[t]he ultimate decision [as to which witnesses should be presented] is the defendant's." *Blanco I,* 452 So.2d 524. The Court's reading of *Milligan* is curious, as that case dealt with a trial court's failure to comply with a statute requiring a minor's parents to be notified of a criminal charge pending against the minor. The Court in *Milligan* held that, although a minor is represented by counsel, the court is not exempt from notifying the parents because "the attorneys' functions is to present alternative courses of action, not make decisions. The ultimate decision-making functions is to be left to the client." *Milligan,* 177 So.2d at 77. It is clear that *Milligan* has no bearing or relation to the issue presented here, an issue regarding trial strategy, which remains in the domain of the attorneys' control.

In *Blanco II,* the Court once again skirted this issue by stating, "[i]t is not rare for counsel and defendant to disagree on strategy or tactics and, when they are unable to agree, we see no prejudice in seeking the advice or direction of the trial judge." *Blanco II,* 507 So.2d at 1383. The record demonstrates, however, that neither Blanco nor his trial counsel requested any guidance from the trial court, but rather, both moved for a change of counsel. On its own initiative, the trial court took control of the defense by ordering Blanco's attorney to follow Blanco's desired trial strategy.

Instead of delving into defense counsel's strategy and preempting the decisions which should have been made by

Blanco's counsel, the trial court had several less intrusive options. It could have permitted substitution of counsel, it could have conducted a *Faretta* inquiry and allowed Blanco to proceed *pro se,*[16] or it could have authorized a hybrid representation whereby trial counsel continued to assist Blanco in an advisory capacity. *United States v. Mills,* 704 F.2d 1553, 1557 (11th Cir. 1983). Finally, the trial court could have simply denied both motions and permitted defense counsel to proceed as they saw fit. In this last mentioned scenario, if defense counsels' strategy proved to be erroneous and prejudicial, Blanco would have preserved an appropriate claim of ineffective assistance of counsel.

The trial court elected none of these alternatives but instead, chose to sail onto an uncharted and dangerous sea by directing the defense's ship. As a result, the defense presented the testimony of Fidel Romero and Enrique Gonzalez, both convicted criminals, who were incarcerated at the time of the trial. Romero's testimony supported Blanco's alibi theory. Romero testified that prior to Blanco's arrest, he helped Blanco look for the allegedly lost identification at several places (T. 1496-98). Defense counsel's strategy, however, was to avoid any testimony about the search for the lost possession, as they believed such witnesses had conflicting stores. In reviewing the testimony of Enrique Gonzalez, those reservations proved accurate. Gonzalez testified on direct that he did, in fact accompany Blanco to several places, including a couple of apartments

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16 Blanco asserts that the trial court should have conducted an inquiry into Blanco's competence to represent himself *pro se* at the point in the trial where the court allowed Blanco to determine which witnesses should be called. This may be so, *see Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), however, the record belies any desire by Blanco to represent himself *pro se.* His request was for a "[c]hange of counsel" (T. 1962), indicating that he still wanted to be represented by an attorney. In any event, the clear error here was in the trial court's overbearing interference into defense counsels' strategy.

where Blanco had been, as well as a bar. On cross-examination, however, respondent impeached Gonzalez's testimony with his own statements taken by respondent the very day before (T. 1516-19). In his statement, Gonzalez declares that he was sure he did *not* go to a bar looking for Blanco's paper (T. 1518-19). Gonzalez explained his change in story by telling the jury that he did not recall the incident when he made the statement, but suddenly regained his memory at the trial (T. 1518-19).

Here, the issue is whether the questionable credibility of this testimony combined with the fact that both Romero and Gonzalez were convicted criminals tainted Blanco's defense so that the trial became unfair and rendered the verdict suspect. In light of all the testimony presented, especially that offered by respondent in its case-in-chief, the evidence so overwhelmingly established Blanco's guilt that any contradiction presented by these two witnesses had a *de minimus* impact upon the guilt-innocence portion of Blanco's trial. Therefore, although the trial court's complete disregard for defense counsels' deliberate trial strategy was clear error, the error was not so prejudicial at the guilt-innocence phase of the trial to warrant the issuance of a writ of habeas corpus. Thus, this claim must be DENIED. However, its effect on the sentencing phase of the trial is another matter and will be discussed below.

CLAIM XIII: TRIAL COURT'S INTERROGATION OF BLANCO AND CONCURRENT FAILURE TO WARN THAT ANSWERS ELICITED COULD BE USED IN SENTENCING AND INEFFECTIVENESS OF TRIAL COUNSEL FOR FAILING TO OBJECT

[22] Blanco claims that the trial court erred in failing to warn him that any statements he made during the proceedings could be used against him for sentencing purposes. Furthermore, Blanco contends that information which was improperly elicited by the trial court during the guilt-innocence phase as well as the sentencing phase, so tainted the sentencing hearing as to render his right to a fair sentencing hearing a nullity. The Tenth Circuit Court of Appeals had held that "[t]itle 18 U.S.C. [Section] 3577 codifies the trial court's right to conduct a broad inquiry prior to sentencing. This right is subject to constitutional limitations, however," *United States v. Jones,* 640 F.2d 284, 286 (10th Cir. 1981), *citing United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Townsend v. Burke,* 334 U.S.736, 68 S.Ct.1252, 92 L.Ed.2d 1690 (1948).

Here, as at trial, the court impermissibly interfered with defense counsels' function at sentencing. As explained in Claim XII, *supra,* the trial court's conduct was erroneous and in this instance, the error did prejudice the court's ruling at sentencing.

While the trial court's observations of Blanco's demeanor during trial was appropriately considered, *Johnson v. Wainwright,* 778 F.2d 623, 632 (11th Cir.1985), the court went beyond mere observation and took an active part in discussing the pros and cons of presenting certain witnesses (T. 1781-88). Moreover, present counsel is correct in observing that the trial court failed to warn Blanco that his answers to the court's questions could be used against him at sentencing. Any information from this impermissible

inquiry should not have been considered. However, this information, to which the trial court should not have been privy, was so pervasive and prejudicial that it cannot be said with any degree of certainty that the information did not weigh upon the judge's decision at sentencing.[17]

Furthermore, in this instance, Blanco has demonstrated a palpable claim of ineffective assistance. Defense counsel failed to protect their client by revealing Blanco's comments to the court and freely discussing their conversations with Blanco concerning witnesses who could be called to testify at the sentencing phase. The United States Supreme Court in *Strickland* stated that:

> [a] capital sentencing proceeding like the one involved in this case,...is sufficiently like a trial in its adversarial format and in the existence of standards for decision, (citations omitted) that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards covering decision.

Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Contrary to the teaching of *Strickland,* at the sentencing hearing, Blanco's counsel let down their guard. Aside from the comments previously mentioned, Mr. Rodriguez, acting as interpreter for Blanco,

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17 Respondent's position on reconsideration that the trial court merely engaged in a harmless colloquy with Blanco is rejected on the strength of the clear violations demonstrated by the record. This was no ordinary colloquy, and despite the trial court's and even the prosecutor's good intentions, there is no denying the facts as stated above. The trial court took control of the defense, and by the time sentencing phase took place, defense counsel acquiesced in this procedure to the detriment of Blanco. Unfortunately, the prejudice is so apparent, it literally demands that a new sentencing hearing occur.

mentioned, Mr. Rodriguez, acting as interpreter for Blanco, told the court that Blanco did not care whether the jury recommended a life or death sentence (T. 1789). Rodriguez also stated, without prodding from the court, that although counsel desired to call Blanco's brother, Blanco did not want his brother to testify (T. 1782) because his brother had shown a lack of disregard by not appearing at trial. Blanco therefore believed that his brother's testimony would not be beneficial (T. 1786). Rodriguez then volunteered that, although Blanco did not want his brother to appear at the sentencing hearing, he contacted him in any event, but that his brother would not likely appear (T. 1786-87). Rodriguez also stated that other possible witnesses had been called but that none of them had contacted defense counsel (T. 1786).

There was no conceivable purpose for revealing these statements to the trial court. Here counsel were deficient in their actions and the confidential information they conveyed proved to be expressly prejudicial inasmuch as the trial court relied upon these statements in justifying the sentence of death (T 1868-69). For example, the trial court considered this prejudicial information when it determined "that [Blanco] did not care if the jury returned an advisory sentence of life or death [which]...indictes...Blanco's lack of concern for his own life [and] manifests that he would be a dangerous person to return to society" (T. 1869). The trial court made the above-conclusion only as a result of its interrogation of Blanco and his counsel concerning hearing and the reasons for calling or not calling witnesses. Manifestly, counsels' failure to protect their client's rights at the sentencing phase resulted in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

Based upon the foregoing discussion, it is apparent that Blanco's sentencing was unconstitutionally tainted. A Writ

of Habeas Corpus is GRANTED upon the basis stated above and shall issue unless Blanco is afforded a new sentencing hearing before an untainted jury and judge within thirty (30) days from the date of this Order or respondent fails to seek a stay of this Order and file a timely appeal. Upon resentencing, the above-mentioned colloquies cannot be considered by the trial court or jury.

CLAIM XIV: TRIAL COUNSEL'S DISCLOSURE OF DEFENSE STRATEGY TO COURT

[23] Blanco also claims that trial counsel provided ineffective assistance because in responding to the Court's requests for information regarding the search for witnesses requested by Blanco, see discussion of Claim XII, *supra,* trial counsel revealed "confidences and secrets" which prejudiced the defense case.

As before, this Court cannot say that trial counsel's disclosures affected the guilt-innocence phase of the trial. Moreover, these disclosures were made in response to the trial court's direct orders. Therefore, trial counsel found themselves upon the horns of a dilemma. Had trial counsel failed to respond to the Court's inquiries, counsel risked acting in a manner contemptuous of the Court's authority. With no real choice available, counsel did as the Court directed.

Blanco's counsel's actions during the sentencing phase, however, are not so defensible. At various times, without prodding, defense counsel volunteered information for no apparent reason, and which could have no effect but to prejudice the outcome of Blanco's sentencing. *See* discussion at Claim XIII, *supra.*

Accordingly, a Writ of Habeas Corpus with regards to the sentencing phase is GRANTED for the reasons stated above

and upon the same conditions as stated in CLAIM XIII.

CLAIM XV: INSTRUCTIONS TO JURY REGARDING THEIR ROLE IN SENTENCING

[24] Blanco claims that the trial court, along with the prosecutor, incorrectly led the jury to believe that their role in sentencing was insignificant. During *voir dire* and when delivering the sentencing instructions, the trial court impressed upon the jury that:

> *[T]he final decision as to what punishment shall be imposed is the responsibility of the judge.* However, it is your duty to follow the law that will now be given to you by me and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty.

(T. 1841) (emphasis added).

This Court must first address whether this claim should be summarily denied as procedurally barred, as it was not raised on direct appeal and was subsequently denied by the Supreme Court of Florida in *Blanco II,* 507 So.2d at 1380. This type of claim requires a review of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct, 2633, 86 L.Ed.2d 231 (1985), and its progeny. The United States Supreme Court in *Caldwell* addressed the issue if whether "state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court" constitutes reversible error. *Caldwell,* 105 S.Ct. at 2640. The Court answered in the affirmative, holding that the trial court's agreement with the prosecutor's statements, gave

> the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need

> for reliability in the determination that death is the appropriate punishment in a specific case." (Citation omitted). Such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment.

Caldwell, 105 S.Ct. at 2645.

Here, the key issue is whether the holding in *Caldwell* is substantial change in the law, which was previously unavailable to raise on appeal, thereby warranting a review of the merits by this Court. There is a direct conflict between the Supreme Court of Florida and the Eleventh Circuit Court of Appeals' interpretation of *Caldwell.* The Florida court has consistently held that "*Caldwell,* which was based in part on prior Florida case law, was not a sufficiently significant change in the law upon which to base a collateral attack." *Phillips v. Dugger,* 515 So.2d 227, 228 (Fla.1987), *citing Witt v. State,* 387 So.2d 922 (Fla. 1980), *cert. denied,* 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Other cases decided in the same manner are *Copeland v. Wainwright,* 505 So.2d 425 (Fla. 1987) and *Aldridge v. State,* 503 So.2d 1257 (Fla. 1987).

In direct contrast to the holdings by Florida courts, the Eleventh Circuit Court of Appeals has likewise addressed this issue under Caldwell and has found these claims cognizable "[b]ecause Caldwell represents a significant change in the law...[and this] claim was not reasonably available to [Petitioner] until the Caldwell decision, the...court erred in finding that [Petitioner] had failed to establish cause for any procedural default in the state courts." *Adams v. Wainwright,* 804 F.2d 1526, 1530-31 (11th Cir. 1986) *amended on rehearing,* 816 F.2d 1493 (11th Cir. 1987) *cert. granted,* ___U.S.___, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988). *See also, McCorquodale v. Kemp,* 829 F.2d 1035 (11th Cir.

1987) and *Tucker v. Kemp,* 802 F.2d 1293 (11th Cir. 1986). Based upon the law in this Circuit, it is clear that the Supreme Court of Florida was in error in finding the claim procedurally barred and in failing to address its merits.

Turning to the substance of the claim, the test "[t]o make the fundamental fairness determination," is "whether there was a 'reasonable probability that, in the absence of the offending remarks, the sentencing outcome would have been different." *Tucker v. Kemp,* 802 F.2d at 1295, citing *Strickland v. Washington,* 466 U.S. 668, 693-94, 104 S.Ct. 2052, 2067-68, 80 L.Ed.2d 674 (1984) and *Tucker v. Kemp,* 762 F.2 1480, 1483 (11th. Cir. 1985). Here, the alleged offending remarks began at *voir dire.* The trial court stated to the potential jurors, that [Blanco's] "sentencing is not up to you...[i]t is up to me" (T. 255) and that "the jury doesn't impose any punishment" (T. 252). Similarly, the Court engaged in the following colloquy:

> THE COURT: Would you be able to leave sentencing, whether it be death or life imprisonment up to me?
>
> [VENIREMAN]: That would be your job. I'm the one has got (sic) to find him guilty, but I'm not the one who's suppose (sic) to set the sentence...I would never say kill nobody. Me—that's your job.
>
> THE COURT: Well, you're right. That is my job.

(T. 260).

[25] The Court discussed sentencing responsibility with another potential juror in front of the venire panel as follows:

> [VENIREMAN]: If I'm selected as a juror, my duty would be to try to the best of my knowledge to

determine whether this person did or did not commit the crime.

THE COURT: And you wouldn't let the sentence, which is my province, interfere with that decision, would you?

[VENIREMAN]: No, you have to sleep with that.

THE COURT: Fine.

(T. 421-22).

Another Venireman expressed his relief that, if chosen as a juror, he would not be responsible for imposing the death penalty: "I'm glad I'm not the judge to sentence for that. I could not kill a man myself." (T. 554).

Finally, in his charge to the jury at sentencing, the Court categorically stated, "the final decision as to what punishment shall be imposed is the responsibility of the judge" (T. 1841).[18]

Relying upon *Tucker v. Kemp,* 802 F.2d 1293 (11th Cir. 1986), respondent argues that any possible prejudice by the trial court's above-referenced statements was cured when the court instructed the jury "that although your recommendation is considered to be advisory your recommendation of death upon conviction of first degree murder is entitled to great weight" (T. 1846). Respondent further maintains that the Court's statements were ameliorated because it instructed the jury that should it return a recommendation of life imprisonment, the trial court could only impose a death sentence if the evidence was "so clear and convincing that no reasonable person could differ" that such a sentence was

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18 The Court has chosen not to cite from the record those instances where the prosecuting attorney made remarks , presumably in violation of *Caldwell,* for reasons which become clear in the discussion to follow.

appropriate (T. 1775-76; 1803; 1846; 2011). Finally, respondent relies upon the Court's instruction that the jury could consider mercy as a reason for imposing life rather than a death sentence (T. 1846).

Respondent's reliance on *Tucker* is misplaced and its attempts to distinguish Caldwell and Adams are to no avail. In *Tucker,* the Eleventh Circuit determined that the offending "division of responsibility" remarks did not violate the *Caldwell* standard because the statements were made only by the prosecuting attorney and not by the court. In *Caldwell* and *Adams,* it was the judge's comments which left the respective juries with false impressions as to the significance of their roles in the sentencing process. Moreover, the fact that many of the trial court's statements have occurred during voir dire does not diminish the effect that these remarks undoubtedly had on the jury. As the court stated in *Adams,*

> These statements were not isolated or insignificant comments. They were made by the judge at a time when he purportedly was informing the prospective jurors as to their role in the trial.

Adams v. Wainwright, 804 F.2d 1526, 1531-32 n.7 (11th Cir. 1986).

This Court's review of the entire record convinces it that the judge's statements to Blanco's jury were more akin to those made in *Caldwell* and *Adams* than to the prosecutor's

remarks at issue in *Tucker*.[19] In light of this determination, a Writ of Habeas Corpus, upon the basis stated above shall issue if respondent does not afford Blanco a new sentencing proceeding before an untainted jury and judge within thirty (30) days of this Order or respondent fails to seek a stay of this Order and file a timely appeal.

CONCLUSION

In summary, the issues discussed in Claims I, III, IV, V, VI, VII, VIII, IX, X, XI and XII are DENIED. Blanco prevails on the issue discussed in Claim II, however, as a result of this Court's resolution of Claims III and IV, Blanco's request for relief in Claim II but be DENIED. The conviction, therefore, remains undisturbed.

A Writ of Habeas Corpus is GRANTED and shall issue upon the bases stated in Claims XIII, XIV, and XV unless Blanco is afforded a new sentencing proceeding before an untainted jury and judge within thirty (30) days of the date of this Order or unless respondent fails to seek a stay of this Order and files a timely appeal.

Petitioner's Motion for Appointment of Counsel Pursuant to the Criminal Justice Act is GRANTED. Mark Evan Olive shall continue to serve as Petitioner's counsel pursuant to 18 U.S.C. Section 3006A.

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19 On reconsideration, respondent directs this Court's attention to two recently decided Eleventh Circuit cases, *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) and *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988). However, contrary to respondent's contention, these cases support rather than repudiate this Court's determination. In both cases, the Eleventh Circuit emphasized the difference between cases where the prosecutor's improper remarks are corrected by the trial court and those cases where the comments are aggravated by the trial court. The situation presented here is the latter, not the former.

Omar BLANCO, Petitioner,

v.

Louie L. Wainwright, etc., et al., Respondents.

Omar BLANCO, Appellant,

v.

STATE of Florida, Appellee.

Nos. 68,263, 68,839.

Supreme Court of Florida.

May 7, 1987.

Rehearing Denied July 10, 1987.

Petitioner who had been convicted of first-degree murder and sentenced to death, and whose conviction and sentence had been affirmed, sought postconviction relief from the trial court and habeas corpus relief from the Supreme Court. The Circuit Court, Broward County, Stanton S. Kaplan, J., denied relief, and petitioner appealed. The Supreme Court, Shaw, J., held that: (1) court sufficiently ensured petitioner Mariel Cuban had assistance of competent translator at all times; (2) petitioner had not shown trial defense counsel's performance in dealing with alleged prejudice against Mariel Cubans was inadequate or identified with any specificity exactly what counsel should have done differently, so as to justify postconviction relief on ineffective assistance of counsel ground; and (3) for purposes of habeas corpus petition, appellate defense counsel was not ineffective for failing to recognize and raise ineffective assistance of trial defense counsel on direct appeal, given that proper and more effective remedy was available for ineffective

assistance of trial counsel through postconviction relief and that if issue were raised on direct appeal, it would not be cognizable on collateral review.

Denial of postconviction relief affirmed; petition for habeas corpus denied.

Barkett, J., concurred in result only.

1. Criminal Law 998(3, 13)

Postconviction relief was procedurally barred with respect to claims which were or should have been presented on direct appeal, including claims that trial court erred in permitting defendant to call witnesses against advice of defense counsel, conducting critical stages of trial in absence of defendant or interpreter, questioning defendant concerning presentation of his defense, unconstitutionally denigrating jury's role in recommending life or death in jury instructions, improperly instructing jury on number of jurors required to return life recommendation, improperly relying on conviction for armed burglary as aggravating factor, improperly relying on previous conviction for armed robbery as aggravating factor, and permitting prosecutor to use inflammatory closing arguments. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law 998(6)

Argument that defendant did not receive simultaneous translation of all proceedings and was not present at bench conferences held outside hearing of jury were not cognizable on postconviction review. West's F.S.A. RCrP Rule 3.850.

3. Criminal Law 642

Court sufficiently ensured that defendant had assistance of competent translator at all times, where public defender retained personal translator for defendant and assigned Cuban-born, Spanish-speaking attorney as assistant trial counsel for defendant, a Mariel Cuban, trial record contained notation that translator was seated next to defendant throughout trial, and at recess, after jury was excused, court conducted short conference and noted that translator had left with jury, presumably with permission of defendant and counsel, and record showed bench conferences were held in defendant's presence.

4. Criminal Law 1119(1)

Record would not support claim that defendant was not permitted to listen to bench conferences if he or counsel so desired, where record showed conferences were held in defendant's presence.

5. Criminal Law 655(1)

Trial judge did not act improperly by directly addressing defendant concerning his desires as to conduct of trial.

6. Criminal Law 998(6)

Issue of whether trial judge acted improperly in directly addressing defendant concerning his desires as to conduct of trial was not cognizable on postconviction review. West's F.S.A. RCrP Rule 3.850.

7. Criminal Law 641.13(1)

Defendant who asserts ineffective assistance of counsel must identify specific omission and show that counsel's performance falls outside wide range of reasonable professional assistance, with courts making every effort to eliminate distorting effects of hindsight and indulging strong presumption that counsel rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment, and must show that inadequate performance of counsel actually had adverse effects so severe that there is reasonable probability that results of proceedings would have been different but for the inadequate performance. U.S.C.A. Const.Amend. 6.

8. Criminal Law 998(17)

Defendant did not show that trial counsel's performance in dealing with alleged prejudice against Mariel Cuban refugees was inadequate or identify with any specificity exactly what counsel should have done differently, so as to entitle defendant to postconviction relief on ground of ineffective assistance, where counsel questioned jurors effectively on any possible prejudices they might have had and, at the same time, persuasively argued to juror panels that such prejudices were inconsistent with their duties and oaths should they be selected for jury. U.S.C.A. Const.Amend. 6.

9. Criminal Law 641.13(6)

Defense counsel could not be faulted for failing to discover presence in New Jersey of childhood friends of defendant, a Mariel Cuban, or for failing to contact such childhood friends, for purposes of ineffective assistance claim, where

defendant himself did not know friends were in New Jersey. U.S.C.A. Const.Amend. 6.

10. Criminal Law 641.13(6)

Defense counsel acted reasonably, for purposes of ineffective assistance claim, in not attempting to override defendant's express wishes that brother and sponsor not be subpoenaed to testify at trial, although brother and sponsor subsequently claimed they were available and would have testified had they been called, where both counsel and defendant talked with or left messages for brother and sponsor over period of days, but neither responded nor appeared to testify. U.S.C.A. Const.Amend. 6.

11. Criminal Law 641.13(6)

Defense counsel was not ineffective by failing to travel to Cuba on his own initiative to search for potential mitigating evidence, where defendant acknowledged he did not make counsel aware of any potential character witnesses other than his brother and sponsor, who were in United States, or urge that counsel seek mitigating evidence from Cuba, and testimonials subsequently gathered by collateral defense counsel regarding defendant's life in Cuba contained substantial derogatory material, with positive material being largely based on distant contacts during defendant's childhood. U.S.C.A. Const.Amend. 6.

12. Criminal Law 641.13(2)

Disagreement between defendant and trial defense counsel over whether to call certain witnesses and defendant's decision to testify, and subsequent disclosure of those disagreements to trial judge by counsel did not constitute conflict of interest or adversely affect counsel's performance,

for purposes of ineffective assistance claim. U.S.C.A. Const.Amend. 6.

13. Criminal Law 641.13(2)

When defense counsel and defendant disagree on strategy or tactics and are unable to agree, there is no prejudice amounting to ineffective assistance in seeking advice or direction of trial judge.

14. Criminal Law 998(17)

Defendant seeking postconviction relief did not establish that he was incompetent to stand trial or that counsel was ineffective for failing to raise issue of incompetency, although expert psychologist opined defendant suffered from organic brain damage and fell into dull-normal range of intelligence, there was evidence that defendant suffered fits of mental derangement as child, and former lawyer from Cuba testified that Cuban legal system differed greatly from United States' legal system and that persons such as defendant might be rendered incompetent by cultural shock brought on by differences in the two systems. U.S.C.A. Const.Amend. 6.

15. Criminal Law 1035(7)

Generally, ineffective assistance of trial counsel is not cognizable on appeal when issue has not been raised in trial court. U.S.C.A. Const.Amend. 6.

16. Criminal Law 641.13(7)

Appellate counsel would not be found ineffective for failing to recognize and raise issue of ineffective assistance of trial counsel, given that proper and more effective remedy for

ineffective assistance of trial counsel was available through postconviction relief, and that if issue were raised on direct appeal, it would not be cognizable on collateral review. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

17. Habeas Corpus 3

Determination of Supreme Court in postconviction relief proceeding that trial defense counsel was effective negated any need to reconsider effectiveness of trial counsel on petition for habeas corpus. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

18. Habeas Corpus 26

Petitioner convicted of first-degree murder and sentenced to death was not entitled to habeas corpus relief on theory he was entitled to be repatriated to Cuba under terms of agreement between United States and Cuba, where "treaty" petitioner relied on was actually press communique from United States Department of State announcing agreement with Cuban for repatriation of Cuban nationals who came to United States via Mariel and had been declared ineligible to enter the United States legally; press communique was not treaty subject to approval by United States Senate and did not implicate Supremacy Clause so as to obligate State to return petitioner to Cuba in lieu of enforcing State's criminal laws. U.S.C.A. Const.Art. 6, cl. 2.

19. Habeas Corpus 4(4)

Habeas corpus is not vehicle for obtaining second appeal of issues which were raised or should have been raised on direct appeal or which were waived at trial.

20. Habeas Corpus 4(7)

Allegation of ineffective assistance of counsel will not be permitted to serve as means of circumventing rule that habeas corpus proceedings do not provide second or substitute appeal. U.S.C.A. Const.Amend. 6.

Larry Helm Spalding, Capital Collateral Representative and Mark E. Olive, Litigation Coordinator for Office for the Capital Collateral Representative, Tallahassee, for petitioner/appellant.

Robert A. Butterworth, Atty. Gen., and Penny H. Brill and Carolyn V. McCann, Asst. Atty. Gen., West Palm Beach, for respondents/appellee.

SHAW, Justice.

The appellant/petitioner Omar Blanco is a Florida prisoner whose conviction for first-degree murder and sentence of death were affirmed by this Court in *Blanco v. State,* 452 So.2d 520 (Fla.1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). A death warrant was signed and execution set for February 3, 1986. Blanco petitioned the trial court for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and this Court for a writ of habeas corpus. After granting a stay of execution and evidentiary hearings, the trial court denied all relief. We have jurisdiction, article V, sections 3(b)(1) and (9), Florida Constitution. We affirm the denial of rule 3.850 relief and deny the petition for writ of habeas corpus.

3.850 Relief.

[1-6] Appellant presented eleven claims to the trial court. We find that eight of these claims are procedurally barred because they either were or should have been presented on direct appeal: (1) did the trial court err in permitting

appellant to call witnesses against the advice of defense counsel; (2) did the trial court conduct critical stages of the trial in the absence of appellant or an interpreter; (3) did the trial court err in questioning appellant concerning the presentation of his defense; (4) did the instructions to the jury unconstitutionally denigrate the jury's role in recommending life or death; (5) did the trial court improperly instruct the jury on the number of jurors required to return a life recommendation; (6) did the trial court improperly rely on the conviction for armed burglary as an aggravating factor; (7) did the trial court improperly rely on a previous conviction for armed robbery as an aggravating factor; and (8) did the prosecutor use inflammatory closing arguments. *Herring v. State,* 501 So.2d 1279 (Fla.1986); *Adams v. State,* 484 So.2d 1216 (Fla.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 1506, 89 L.Ed.2d 907 (1986); *Smith v. State,* 457 So.2d 1380 (Fla.1984); *Jones v. State,* 446 So.2d 1059 (Fla.1984); *Demps v. State,* 416 So.2d 808 (Fla.1982). Only two of these procedurally barred claims merit any comment. Claim two was raised in part on direct appeal. Appellant now attempts to expand the claim by arguing that he did not receive a simultaneous translation of all proceedings and was not present at bench conferences held outside the hearing of the jury. Neither argument is cognizable on collateral review. Moreover, *Suarez v. State,* 481 So.2d 1201 (Fla.1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986), is directly on point. The public defender retained a personal translator for appellant and assigned a Cuban-born, Spanish-speaking attorney as assistant trial counsel. Both had served appellant in a previous trial for armed robbery and advised the court they had no difficulty communicating with him. The trial record contains a notation that the translator was seated next to the defendant throughout the trial. The record also shows that the trial judge required the translator and assistant counsel to demonstrate their proficiency in open court. The record also shows that at a

noon recess, after the jury was excused, the trial judge conducted a short conference and noted that the translator had left with the jury, presumably with the permission of appellant and counsel. The trial judge later queried assistant counsel if he had advised appellant, in his native tongue, as to what had occurred and was assured that he had done so. We are satisfied, as in *Suarez,* that the court ensured that the appellant had the assistance of a competent translator at all times. On the question of appellant's presence at bench conference, the record shows that these conferences were held in appellant's presence. Nothing in the record supports the notion that appellant was not permitted to listen to these conferences, if either he or counsel so desired. On claim three, appellant attempts to revise claim one, which was presented and rejected on direct appeal, into a claim that the trial judge violated appellant's right against self-incrimination by questioning him on disagreements he had with defense counsel concerning the calling of witnesses. We rejected the core of this argument on direct appeal and see no impropriety in the judge directly addressing appellant concerning his desires on the conduct of the trial. The issue is not cognizable on collateral review.

Appellant presents four separate but overlapping arguments asserting that he received ineffective assistance of trial counsel. Appellant came to the United States from a Cuban prison during the 1980 boatlift from Mariel, Cuba. His brother, who was also in prison there, preceded him by several months. Both were detained at camps in the United States and released to the same sponsor in Dade County. The crimes here occurred, and were tried, in adjacent Broward County in 1982. Prior to the trial, defense counsel was concerned that the bad public reputation of Mariel refugees might prejudice the jury. Accordingly, the defense filed a motion for a change of venue but withheld moving it to hearing pending jury selection. On voir dire, without disclosing that appellant was a Mariel refugee from a Cuban

prison, defense counsel questioned jurors closely and repeatedly on any prejudices they might have against Cuban emigrants in south Florida. The answers were satisfactory and each juror voiced impartiality. Appellant asserts, nevertheless, that counsel was ineffective for not dealing effectively with prejudice against Mariel refugees. In support, appellant produced the testimony of two Cuban emigree college professors who reviewed, at length, Cuban immigration to the United States and the negative public perception of Mariel refugees. The primary thrust of their testimony appears to have been that an overwhelming majority of the Mariel refugees were not criminal prisoners in Cuba and that the public perception of them as such was false. One professor opined that a Mariel refugee could not obtain a fair trial anywhere in the United States; the other professor concluded that a Mariel refugee could not receive a fair trial in south Florida. Neither was familiar with trial court procedures for ensuring that a defendant has an impartial jury or the actual measures taken in this case.

[7,8] Claims of ineffective assistance of counsel are controlled by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been

different but for the inadequate performance. Applying these precepts, appellant has not shown that counsel's performance in dealing with "Mariel prejudice" was inadequate or identified with any specificity exactly what trial counsel should have done differently. Our review of the trial record indicates that trial counsel questioned the jurors very effectively on any possible prejudices they might have had, and, at the same time, persuasively argued to the juror panels that such prejudices were inconsistent with their duties and oaths should they be selected for the jury. Even if the two experts correctly characterized the general state of public opinion, it does not follow that this jury, selected under the safe-guards offered defendant, was anything other than impartial. We reject the bald assertion that Mariel refugees cannot receive a fair trial in the United States or south Florida.

[9, 10] Appellant also argues that trial counsel was ineffective for failure to investigate and present mitigating evidence. In support of this point, collateral counsel travelled to Cuba and obtained written testimonials from relatives and friends opining that appellant came from a good family, was of good character, was nonviolent, had a grandmother who suffered fits of mental derangement, and himself suffered as a child from such fits. Appellant also offered similar testimony from childhood friends of the family who themselves came to the United States during the Mariel boatlift and who stated they would have testified for appellant had they been asked. In addition, appellant also presented the testimony of his brother and a written testimonial from his sponsor, both of whom came to the United States during the Mariel boatlift, who claimed they were available and would have testified had they been called. None of these relatives or friends had any knowledge of the case but may professed that appellant was innocent. The trial record itself shows that trial counsel perceived a need to "humanize" appellant by presenting such evidence. To

that end, the trial court directed that appellant be given an unlimited number of phone calls and that appellant and counsel both attempt to locate and persuade the brother and sponsor to testify at trial. The trial records shows that both counsel and appellant either talked with, or left messages for, the brother and sponsor over a period of days, but that neither responded or appeared to testify. The trial record contains approximately fifty pages of transcript on this subject but, despite a four-day continuance granted between the guilt and penalty phases, the efforts were unavailing and both counsel and appellant advised the court that they did not wish to call witnesses in mitigation. Under the circumstances as they existed at trial, we must determine whether counsel was ineffective for failing to further investigate and present mitigating evidence. We note first that the record shows that appellant himself did not know of the presence in New Jersey of the childhood friends. Consequently, counsel cannot be faulted for failing to discover their presence or for failing to contact them. Concerning the brother and sponsor, the record strongly suggests that neither the brother nor the sponsor wished to appear on behalf of appellant and, under those circumstances, counsel acted reasonably in not attempting to override appellant's express wishes that they not be subpoenaed.

[11] The question remains whether trial counsel, under circumstances existing at the time of trial, was ineffective for failing to travel to Cuba on his own initiative to search for potential mitigating evidence. Appellant acknowledges that he did not make counsel aware of any potential character witnesses other than his brother and sponsor or urge that he seek mitigating evidence from Cuba. Nevertheless, he now urges that counsel had an independent duty to seek such evidence. We recognize that counsel has a degree of independent responsibility to act in the best interests of a client, but "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's

own statements or actions." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. The testimonials gathered by collateral counsel show that appellant went into the Cuban military around 1966 and experienced numerous disciplinary problems which resulted in his entering into forced service cutting sugar cane in lieu of military service or imprisonment. Thereafter, he was sentenced to two terms of six months and one year in prison for theft and to a term of eighteen years for black marketing. It was during this imprisonment that he was released through the Mariel boatlift. Thus, the testimonials contain substantial derogatory material and the positive material is largely based on distant contacts during appellant's childhood. Under these circumstances, and given appellant's disinterest, we are not persuaded that trial counsel acted unreasonably or ineffectively in not traveling to Cuba on his own initiative to investigate and present potential mitigating evidence as might be developed. We note, in this connection, that the evidence of appellant's Cuban background would necessarily bring out and emphasize appellant's background as a criminal prisoner who entered the United States through the 1980 Mariel boatlift. We agree with the trial judge that developing and presenting such evidence would have been directly contrary to trial counsel's adopted trial strategy of deemphasizing or avoiding the Mariel background. Given the mixed nature of the evidence subsequently developed, we are not persuaded that there is a reasonable probability that its absence made a difference in the ultimate outcome.

[12, 13] Appellant next argues that a conflict of interest developed between counsel and himself because of disagreements over whether to call certain witnesses and his own decision to testify and the subsequent disclosure of these disagreements to the trial judge by counsel. We do not agree that this constitutes a conflict of interest or that the disagreements adversely affected counsel's performance. It is

not rare for counsel and defendant to disagree on strategy or tactics and, when they are unable to agree, we see no prejudice in seeking the advice or direction of the trial judge. Under these circumstances, counsel has no other viable choice. In this case, we held on direct appeal that the trial judge properly resolved the conflict in favor of appellant's choice. Appellant is simply taking an issue which has already been decided adversely to his position and attempting to relitigate it under the guise of ineffective assistance of counsel.

[14] Finally, appellant argues that he was incompetent to stand trial and that counsel was ineffective for failing to raise the issue incompetency. In support, appellant cites the report of an expert psychologist, prepared post-conviction, which opines that appellant suffers from organic brain damage and falls into the dull-normal range of intelligence. Appellant also cites evidence that, as a child, he suffered fits of mental derangement. Appellant also relies on the testimony of a former lawyer from Cuba that the Cuban legal system differs greatly from this country's system and that persons such as appellant might be rendered incompetent by cultural shock brought on by the differences in the two systems. The state responds that the expert psychologist also stated that the organic brain damage was not anything major and that appellant does not have a major psychological problem. Moreover, the state points out, appellant's childhood fits ceased when he was eight years old, that he had a normal and active life thereafter, and was in his thirties when the crimes and trial occurred. In addition, the record shows that trial counsel considered obtaining a psychiatric examination, but, with appellant's concurrence, decided not to do so because appellant gave every appearance of competency and a theory of incompetency would dilute appellant's strategy of denying guilt. There was no evidence calling into question appellant's competency to stand trial and mental condition is not necessarily an issue

in every criminal proceeding. *Bush v. Wainwright, Bush v. State,* 505 So.2d 409 (Fla.1987). As to the cultural shock of encountering this country's legal system, we agree with the trial judge that this testimony was of a general nature with limited, if any, relevance to the case at hand. The witness knew nothing of this case or appellant and based his specific testimony largely on his experience as a translator for four Latin-American defendants tried in Cincinnati, Ohio. We note also the trial judge's comment that appellant knew our system well enough to invoke his right to remain silent when arrested and that appellant was tried and convicted of armed robbery in a separate proceeding immediately prior to trial here. It appears that appellant was more experienced and better acquainted with trial procedures and his rights thereunder than the average defendant.

Writ of Habeas Corpus

[15-17] Blanco's petition for writ of habeas corpus is almost entirely a repetition of the issues raised in the rule 3.850 proceeding. The gravamen of the petition, to use petitioner's phrase, is appellate counsel's failure to recognize egregious fundamental constitutional error appearing on the face of the trial record, to wit: ineffective assistance of trial counsel. Generally, ineffective assistance of trial counsel will not be cognizable on direct appeal when the issue has not been raised before the trial court. *State v. Barber,* 301 So.2d 7 (Fla.1974). There are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue. *Stewart v. State,* 420 So.2d 862 (Fla.1982), *cert. denied,* 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983); *Foster v. State,* 387 So.2d 344 (Fla.1980). Petitioner asks that we expand this exception by holding, in effect, that not only may it be raised

on direct appeal but that it *must* be raised on direct appeal, i.e., appellate counsel is ineffective for failing to do so. We decline to do so. A proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective. By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material. Our determination above on the rule 3.850 proceeding that trial counsel was effective negates any need to replough this ground once again.

[18] Petitioner also urges that he is entitled to be repatriated to Cuba under the terms of an agreement between the United States and Cuba. Under petitioner's theory, this agreement is a treaty, which under the Supremacy Clause, article VI, United States Constitution, obligates Florida to return petitioner to Cuba in lieu of enforcing its criminal laws. The "treaty" petitioner relies on is actually a press communique from the United States Department of State announcing an agreement with Cuba for the repatriation of "Cuban nationals who came to the United States in 1980 via the port of Mariel, and who have been declared ineligible to enter the United States legally." The state points out that the United States government has not interceded on petitioner's behalf to enforce the supremacy clause and encloses a letter from the State Department which states that the agreement obligates Cuba to accept the Cuban nationals in question, but does not obligate the United States to return them. Petitioner's reliance on the press communique is misplaced; a press communique is not a treaty subject to approval by the United States Senate and does not implicate the supremacy clause.

[19, 20] In its answer brief to the issues raised on appeal of the denial of rule 3.850 relief, the state points out numerous instances of issues which are procedurally barred because they either were or should have been raised on direct appeal. In his reply brief, collateral counsel makes the representation to this Court that "[i]f direct appeal was the place to raise this, it is cognizable in the habeas petition." This is a totally incorrect statement of the law. As we have said many times, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Steinhorst v. Wainwright,* 477 So.2d 537 (Fla.1985); *Harris v. Wainwright,* 473 So.2d 1246 (Fla.1985); *McCrae v. Wainwright,* 439 So.2d 868 (Fla.1983).

We affirm the denial of post-conviction relief and deny the petition for writ of habeas corpus.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

vs. CASE NO. 82-453CFA

OMAR BLANCO, Judge Kaplan

Appellee.

_____/

ORDER DENYING MOTION TO VACATE JUDGMENT AND SENTENCE

THIS CAUSE having come before the Court on the Defendant's Motion to Vacate Judgment and Sentence, and the Court having considered same, and after having held an Evidentiary Hearing in this matter, it is hereby,

ORDERED AND ADJUDGED as follows:

This matter is before the Court on a Motion to Vacate Judgment and Sentence, pursuant to **Florida Rule of Criminal Procedure** 3.850, filed by the Defendant, Omar Blanco, who was sentenced to death on June 21, 1982, for the murder of John Ryan. The Defendant was also sentenced to a consecutive sentence of seventy-five years with a mandatory minimum of three years imprisonment on a conviction for armed burglary. This Court retained jurisdiction for one-third or twenty-five years in order to review any release order for parole in the armed burglary conviction. The Judgment and Sentences were affirmed on direct appeal.

Blanco v. State, 452 So.2d 520 (Fla. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 940 (1985).

On January 7, 1986, the Governor of Florida signed a death warrant for Mr. Blanco's execution. The execution was scheduled for February 4, 1986, at 7:00 a.m. On Friday, January 31, 1986, the Defendant filed a Motion to Vacate Judgment and Sentence and Motion for Stay of Execution. The Motion to Vacate Judgment and Sentence consisted of eighty-two pages alleging eleven grounds for relief, including various claims of the ineffective assistance of counsel. Accompanying the Motion was an Appendix consisting of three volumes. In addition, a Memorandum of Law in support of the Defendant's Motion for Stay of Execution consisting of thirty-three pages was also filed.

On February 3, 1986, an Evidentiary Hearing was held on a Motion to Stay Execution. The Defendant was present with his interpreter, Francisco Rivera, at the hearing. At the hearing, the Defendant presented three witness, and indicated that he had a number of other witnesses to present. Whereupon this Court entered an order staying the Defendant's execution. The Defendant then presented an additional witness, and this Court continued the Evidentiary Hearing until February 27, 1986. Prior to said date, the Defendant's counsel requested a continuance of the hearing, and the State had no objection. The Evidentiary Hearing continued on March 20 and 21, 1986. At these hearings, the Defendant was again present with his interpreter, and presented an additional eight witnesses, as well as a statement by defense counsel, Mark Olive. The State presented the testimony of one witness, Carlos Rodriguez, one of the Defendant's original trial attorneys. This Court asked Mr. Blanco if he wanted to testify at the hearing, to which Mr. Blanco indicated he did not. Defense counsel stated he was not ready to argue the Motion to Vacate Sentence and Judgment and requested permission to file a

memorandum of law. Over the State's objection, this Court granted defense counsel's request, and ordered that the memorandum of law be filed within fifteen days. The Court also gave the State permission to file a Response if they so chose. On April 4, 1986, this Court received a letter from defense counsel requesting additional time to file their memorandum. This Court has denied that request. After careful consideration of the testimony and evidence introduced at the hearings, as well as the entire record in this case the Court finds as follows:

I

INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING HEARING

The Defendant alleges that the was denied his right to effective assistance of counsel during the sentencing phase because of his attorney's failure to investigate and present mitigating evidence, specifically information that would have dispelled the discriminating "Mario Marielito myth" or separated the Defendant from it, evidence that the Defendant had organic brain damage, and evidence from family friends as to their love and support of the Defendant, as well as the Defendant's background. This claim must be reviewed under the United States Supreme Court two-pronged test in *Strickland v. Washington,* 466 U.S. 668 (1984), wherein it was stated:

> "First, the Defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

deprive the Defendant of a fair trial, a trial whose result is reliable."

In explaining the appropriate test for proving prejudice, the Court held that "the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

The Defendant asserts that in "light of the anti-Cuban sentiment in the community at the time of the trial, and the public misinterpretation about the violent criminal backgrounds and immoral characters of Mariel exiles, any information that would have dispelled the discriminating Marielito myth or separated the Defendant from it would have been especially mitigating at sentencing." To support his claim, the Defendant presented the testimony of Felix Masud-Piloto, Ph.D., Juan Clark, Ph.D., and Siro Del Castillo. Masud-Piloto and Clark were qualified by this Court to testify as experts in the Cuban migrating to the United States, including the 1980 Mariel boatlift. Mr. Castillo testified about his work with the Mariel refugees. Although their testimony was informative, this Court must discount their testimony for several reasons. First, Carlos Rodriguez, during his testimony, indicated that whatever statements he made on the record at the time were accurate as it what had transpired in 1982. The transcript shows that a the sentencing hearing, Mr. Rodriguez stated that he had a Dr. Curtis under subpoena, a linguistics and cultural expert, who had studied Latin culture. Rodriguez stated that he had contemplated calling Dr. Curtis to testify about the cultural shock that may have caused the Defendant extreme duress. Rodriguez then stated that he decided not to call Dr. Curtis because he believed that the argument that this cultural shock caused the Defendant to kill someone would not have any merit. Rodriguez stated that in effect

such an argument would be in conflict with the Defendant's assertions that he did not kill anyone. Rodriguez then stated that he told the Defendant that he had considered the testimony but that it would be a waste of time. Rodriguez stated that the Defendant understood and that he did not want to call anyone. Accordingly, based on the Record, the Court finds that trial counsel had considered presenting this type of evidence, but for strategic reasons, with the Defendant's agreement, chose not to present it. As a strategic choice made after a reasonable investigation, the decision not to present this evidence is one within counsel's direction. *See Brown v. State,* 439 So.2d 872 (Fla. 1983). In addition, where the Defendant was still asserting his innocence, it was not unreasonable for counsel to elect not to present mitigating evidence which implies guilt but attempts to excuse the culpable conduct. *See Funchess v. Wainwright,* 772 F.2d 683, 689-690 (11th Circuit, 1985). Additionally, the Court finds that presenting such testimony by these experts would have undermined trial counsel's general strategy from the onset of the trial to deemphasize the Defendant's Mariel background. Mr. Rodriguez testified at the hearing that that was one of their strategy decision. His testimony is further supported by the trial record. It should be noted that both experts testified that their studies concerning prejudice against the Mariel refugees was based primarily on Dade County and not Broward County. Furthermore, neither expert was familiar with any attempts by this Court or counsel to insure that the Defendant received a fair trial as far as it concerned his Mariel background. For example, during voir dire, in order to determine whether the jury would be prejudiced against the Defendant because he was Cuban, counsel asked the potential jurors repeatedly about their feelings about Cubans and the Mariel boatlift, but at no time was it indicated that the Defendant was a Marielito. Only two jurors indicated that they had some problems with the

Mariel boatlift, Mr. Everhart and Mr. Altman. Mr. Everhart stated that even though from what he read he believed that criminals and insane had come in from Mariel, that would not affect him in his decision in this case. Mr. Everhart was stricken from the jury panel by defense counsel. Mr. Altman also indicated that he believed that criminals and insane persons came from Mariel. However, he stated that he had no prejudices against the Cuban community. Mr. Altman was sworn in as a juror. It should be noted that Mr. Altman had also indicated that he was against the death penalty. All of the remaining jurors indicated that they had no prejudices against Cubans and that they could be fair and impartial.

The only time the jurors became aware that the Defendant was from Mariel was at the sentencing hearing. However, there was no indication that he was a criminal in Cuba or had an immoral character. The Court finds that the evidence presented at the evidentiary hearing concerning the Mariel boatlift would have simply stressed and brought to the jury's attention factors which counsel had strategically tried to avoid. It is thus clear that counsel's actions were not deficient, and it is also clear that where the jury was not prejudiced against the Defendant because of his background, counsel's failure to present said evidence would not have affected the outcome of the proceeding.

II

FAILURE TO PRESENT TESTIMONY OF DEFENDANT'S HISTORY, FAMILY AND BACKGROUND

The Defendant alleges that counsel was ineffective for failing to go to Cuba before trial to obtain statements from Defendant's family and friends as to his history and background. He also alleges that counsel should have procured

the testimony of family friends who lived in New Jersey, and that counsel was ineffective for failing to obtain the testimony of the Defendant's brother, Rodolfo Blanco, and his sponsor Teodoro Martinez, who lived in Dade County. At the evidentiary hearing, the Defendant presented the testimony of Rosa Pinillos, Simeon Pinillos, Giraldo Luis Herrera, Martha Venegas, Barbara Pinillos, and Consuela Cardoza. Each testified that they had know the Defendant in Cuba and like the Defendant had come to the United States in 1980 in the Mariel boatlift. They all testified that they were living in Union City, New Jersey in 1982, and if contacted would have come to Florida to testify on the Defendant's behalf. However, they also all testified that in 1982 they did not know where the Defendant was living nor had they been in contact with the Defendant. They had become aware of the Defendant's incarceration only after his conviction. Mark Olive, the Defendant's present counsel, stated for the record that he was able to obtain a visa to go to Cuba where he obtained numerous statements from the Defendant's family and friends, as well as photographs and other documents. Mr. Olive stated that the information on who to contact in Cuba had come from the Defendant. Rodolfo Blanco, the Defendant's brother, testified at the hearing that in June of 1982, he was in Miami and had never been contacted by any attorneys to testify in his brother's behalf. He testified that although he visited the Defendant in jail before trial he did not come to the trial. Rodolfo also stated that if he had been contacted by anyone to testify at trial he would have.

Carlos Rodriguez testified at the hearing that he had discussed with the Defendant about getting his family there. The Defendant told him about his brother Rodolfo, and Rodriguez testified that he talked to a male over the phone, who identified himself as Rodolfo. Rodriguez stated that although Rodolfo said he would come to the trial, he never did. The Court, recognizing a conflict of the testimony

between Mr. Rodriquez and Rodolfo Blanco, finds that either Rodriguez did in fact talk to Rodolfo Blanco or that it was reasonable for him to believe that the person he did talk to was in fact the Defendant's brother. Mr. Rodriguez's testimony is further supported by the trial transcript, which shows that prior to the sentencing hearing, Rodriguez had informed the Court that he had been discussing with the Defendant the possibility of calling Rodolfo. Rodriguez stated at the time that the Defendant did not believe that his brother wanted to come. Rodriguez stated that he explained to the Defendant that he wanted his brother to testify about the Defendant's family ties, his family in Cuba, that there might have been some type of emotional strain that the Defendant might have been in, and to tell about the Defendant's background. The Defendant told Rodriguez he did not want to call his brother. This Court then asked if the Defendant wanted to call any other family members of friends, and Rodriguez stated that the Defendant said that he did not want to call anyone to testify in his behalf. Rodriguez further stated that he had explained the nature of the penalty phase to the Defendant and what he might be able to present. Rodriguez reiterated that the Defendant's brother had shown a complete and total disregard for the Defendant's as far as wanting to appear at the trial and he did not believe that that type of attitude or testimony would be beneficial. Rodriguez also stated that he personally had talked to the Defendant's brother and explained to him about both the trial and sentencing phases. The Defendant's brother indicated his willingness to show up, but he failed to contact Rodriguez or to appear in court. Rodriguez stated he sent out a subpoena and served it at Rodolfo's home. Rodriguez then stated that even if the Defendant's brother showed up, he did not think they would call him a that point. It should further be noted that at the trial stage Rodriguez informed this Court that he had sent out a subpoena for Rodolfo, that he had talked to Rodolfo, who seemed to be

cooperative, but did not come to court. Rodriguez later reported that he had talked to Rodolfo and told him when and where to come to court, and Rodolfo indicated that even though his wife was in the hospital, he would come to court. The Defendant then told the Court that he had tried to call his brother, but his brother would not accept his phone call. Rodriguez later informed the Court he had again called Rodolfo, but was told Rodolfo was not there. He left a message that he needed Rodolfo in court.

Rodriguez also testified at the evidentiary hearing that the Defendant had given him the names of friends in Hollywood, Florida. He stated that he Defendant had never told him about any friends or family in Union City, New Jersey. This testimony is uncontradicted. Rodriguez also testified that the Defendant may have said he had family in Cuba, but Rodriguez did not know if they were dead or alive. There was no testimony to show that the Defendant had told Rodriguez what family or friends were in Cuba and how to get in touch with them.

The Defendant's sponsor Teodoro Martinez did not testify at the evidentiary hearing. Thus, Martinez's statements and his affidavits could not be tested for their truth and veracity through cross-examination. However, it should be noted that the trial transcript reveals both Rodriguez's and the Defendant's attempts to procure Martinez's testimony. The Defendant stated he had called Martinez, who indicated he would not testify voluntarily, then he stated he would testify but he needed to be told ahead of time because he had to work. The Defendant stated that he told Martinez he would have his lawyer call him. Rodriguez later told the Court that he had called Martinez's place of employment and left a message. T. Don Tenbrook, the Defendant's other trial counsel, later stated that he was told by a member of the press that Martinez had given derogatory information

to the press about the Defendant's background, and thus he did not believe Martinez would be a good defense witness.

The evidence thus reveals that counsel made attempts to contact the Defendant's brother and his sponsor, Martinez. Both witnesses were reluctant to testify. Counsel's failure to call those witnesses based on that reluctance is not ineffective assistance. *Messer v. Kemp,* 760 F.2d 1080, 1091-1092 (11th Circuit, 1985). Where counsel's failure to further investigate and call witnesses was a strategic decision based upon the Defendant's discouragement of the attorney from undertaking such an investigation, and where counsel determined that there was no possibility of finding anything helpful after the Defendant's brother was unwilling to be of assistance, counsel did not render ineffective assistance. *See Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Circuit 1985). The Defendant at no time gave counsel reason to believe that pursuing an investigation for family or friends would be helpful or would be fruitful. There is no testimony to show that the Defendant told counsel about any of these witnesses, where to find them, that they would be of help, or that *he* wanted them called. The Defendant's statement at the sentencing hearing shows otherwise. Furthermore, it should be noted that the introduction of the testimony or letters from the Defendant's statement at the sentencing hearing shows otherwise. Furthermore, it should be noted that the introduction of the testimony or letters from the Defendant's friends and family would have made the jury aware that the Defendant's friends and family would have made the jury aware that the Defendant was in prison prior to coming to the United States. That would hardly have helped the Defendant and was also in contradiction to counsel's strategy to keep these prior crimes from coming to the jury's attention. Rodriguez testified at the sentencing hearing that he was aware that the Defendant had been in prison in Cuba. The record reveals that at the sentencing hearing, counsel was willing to waive the mitigating

circumstance of lack of prior criminal history in order to avoid the State bringing out the full extent of the Defendant's prior criminal history. It is clear that counsel's failure to call these witnesses, or proffer the evidence, was a matter of trial strategy, and thus does not support a claim of ineffective assistance of counsel. *See Strickland, supra, Magill v. State,* 457 So.2d 1367 (Fla. 1986); *See also Griffin v. Wainwright,* 760 F.2d 1505, 1513 (11th Circuit 1985).

III

FAILURE TO SEEK A PSYCHIATRIC OR PSYCOLOGICAL EVALUATION OF THE DEFENDANT

The Defendant also alleges that counsel was ineffective for failing to seek a psychiatric or psychological evaluation of him in that said evaluation would have revealed that the Defendant is suffering from organic brain damage. Initially, the Court finds as it did with the other allegations, that the decision not to seek a psychiatric examination was a strategic one. Carlos Rodriguez testified at the evidentiary hearing that he had thought about calling a psychologist or psychiatrist for the evidentiary phase. Rodriguez testified that he had discussed it with having been found guilty and indicated that he did not care. The record of the trial proceedings further supports the conclusion that it was a strategic decision. At the sentencing hearing Rodriguez stated that he had discussed calling a psychiatrist, and the Defendant was in agreement with him on this issue. Rodriguez stated that the Defendant did not have a competency problem nor an insanity problem. He also stated that he had seen no evidence of any type of emotional duress that would constitute a mitigating factor. Rodriguez, with the Defendant's agreement, stated that he did not think that it would have aided matters to call a psychiatrist. Although

the failure to investigate possible incompetency or any insanity defense, or mental mitigating factors may rise to a level of ineffective assistance of counsel, such is not the case where counsel has no knowledge of the Defendant's mental problems prior to trial, counsel has no reason to believe that the Defendant has mental problems, and where the Defendant has cooperated in the preparation of his defense and understands the charges against him. *See Funchess v. Wainwright,* 772 F.2d 683, 689 (11th Circuit (1985).

The Defendant has simply not demonstrated that there was ever any reasons for counsel to suspect or believe that he had mental problems that required investigation for either trial or sentencing. The record reveals that the Defendant was able to aid counsel in his counsel in his defense. At trial, the Defendant testified at length to where he was and what he was doing at the time of the murder. He also explained how he had lost his identification papers. The Defendant also was able to explain to the Court what witnesses he wanted called and why. The ability of a defendant to give a detailed account of the crime is inconsistent with the contention that he has diminished or impaired mental capacity. *See Buford v. State,* 403 So.2d 953 (Fla. 1981). In addition, presentation of this type of evidence, attempting to justify the Defendant's actions, would have been inconsistent with his defense that he did not commit the murder. *Funchess, supra.*

Further, the Court finds that the testimony of Fernando Melendez, Ph.D., the psychologist who had evaluated the Defendant four years after the murder, does not present a reasonable probability that the outcome of the proceedings would have been different. Although Dr. Melendez testified that his tests revealed that the Defendant suffers from organic brain damage that reflects cortical or subcortical seizures, this Court questions the reliability of and discounts Dr. Melendez's conclusions based on the points

brought out by the State in their cross-examination. For example, Dr. Melendez did not think it was important to know the facts of the murder. In addition, although the Defendant may have suffered from epileptic seizures as a young child, the evidence shows that the seizures ended while the Defendant was very young and he was able to participate in sports, particularly baseball, and that he had at one time wanted to go into medicine.

There is certainly no constitutional requirement that in every first degree murder case in which death is a possible penalty that counsel investigate psychiatric defenses. Where, as here, there are no reasons to believe that the Defendant suffered from any mental problems, counsel was not ineffective for trying to pursue what he reasonably believed to be nonexistent defenses. Counsel's argument, as reflected in the record, that life imprisonment without the possibility of parole for twenty-five years was as bad a punishment as death, along with the request for mercy, was a reasonable strategic decision for sentencing hearing. *See Griffin, supra.* Thus, the Court finds that the trial counsel provided the Defendants with the effective assistance of counsel at the sentencing phase.

IV

CLAIMS WHICH ARE WAIVED

At the hearing, the State moved to strike various issues as ones which could have or should have been raised at the trial, and if properly preserved, on direct appeal. The Court finds that issues two, three, four, five, seven, eight, nine, and eleven are all issues which should be stricken. The Court further finds that none of these issues raise any claims which could be considered a "change in the law" under *Witt v. State,* 387 So.2d 922 (Fla. 1980), so as to be cognizable under Rule 3.850.

As to the specific issues, the Court also finds that issue two, forcing defense counsel to present evidence, was raised on direct appeal, *Blanco, supra.* Similarly, as to issue four, concerning the Defendant's absence from the courtroom during the ruling on the Motion to Suppress, this issue was also raised on direct appeal. Furthermore, the Defendant's failure to raise at trial the issue of the interpreter precludes him from raising it in a post-conviction proceeding. *Gil v. State,* 266 So.2d 43, 45 (3rd DCA 1972). In addition, the Florida Supreme Court has recently held that that a Defendant is not entitled to simultaneous translation. *Suarze v. State,* 481 So.2d 1201 (Fla. 1985). As to issue nine, the claim that sentencing the Defendant to death based on the statutory aggravating circumstance that the murder was committed during the course of a felony, fails to narrow the class of persons eligible for the death penalty, has been rejected by the Florida Supreme Court previously. *Squires v. State,* 450 So.2d 208, 212 (Fla. 1984).

V

CONFLICT OF INTEREST

The Court has found this issue to have been waived because no additional testimony was introduced at the hearing relating to this claim, and since the alleged error was apparent on the face of the record, it was one which could have been raised on direct appeal even in the context of an ineffective assistance of counsel. *See Stewart v. State,* 420 So.2d 862 (Fla. 1982); *Gordon v. State,* 469 So.2d 795 (4 DCA 1985). The Court also finds the Defendant's claims of a conflict of interest are merely speculative and not supported by the record. Whatever standard is used for review of this issue, whether the one stated in *Cuyler v. Sullivan,* 446 U.S. 335 (1980), *Strickland, supra,* or *Nix v. Whiteside,* ___ U.S. ___, 38 Cr.L. 3143 (February 26, 1986, the Court finds that

in this case the Defendant has totally failed to meet his burden.

The Court further finds its discussions with trial counsel and the Defendant concerning the witnesses he wanted to call were necessary and appropriate for this Court to act on the Defendant's motion to have the attorneys withdrawn. The Court needed to determine whether adequate grounds existed for replacement of counsel. *Smith v. State,* 444 So.2d 542 (1st DCA 1984), and *Hudson v. Rushen,* 686 F.2d 826, (9th Cir., 1982). The Court finds that trial counsel did not reveal any secrets or confidences, but merely responded to what was necessary for the Court to make its determination of the Defendant's and counsel's motions to withdraw. Once this Court made that determination, and held that the Defendant had a right to call his own witnesses, all the conversations which occurred between the trial court, counsel and Defendant were to insure that Defendant understood what was happening and to insure that he received a fair trial. The record reflects that once the Defendant was able to call some of his witnesses, and the Court explained to him what was happening, the Defendant acquiesced in the continuing representation by counsel. Such action belies the continuation of a conflict. *See Aldridge v. State,* 425 So.2d 1132 (Fla. 1983). In addition, the Court finds that the alleged conflict did not adversely affect defense counsel's performance. The Defendant was able to present his additional witnesses at the trial stage. Counsel made diligent efforts to locate other witnesses. Counsel explained the sentencing proceeding to the Defendant. It was the Defendant who did not want to call any witnesses or testify. Counsel did not abandon the Defendant. Counsel made a strong argument to the jury and to the Court against imposition of the death penalty. The Court would also note that the portion of the Order retaining jurisdiction which notes the Defendant's lack of remorse and failure to present mitigating evidence was included to show the Defendant

would be a dangerous person to return to society. The Court, as the Order reflects, did not consider the same in imposing the death sentence.

In sum, the Court finds that throughout the Defendant's entire trial and sentencing proceedings, he was afforded private and confidential communication. Such was not abridged at any time. The Defendant has failed to support this claim of ineffective assistance of counsel.

VI

DEFENDANT WAS INCOMPETENT TO STAND TRIAL AND COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE COMPETENCY ISSUE (CLAIM SIX)

The Defendant alleged that he was incompetent to stand trial, citing the testimony of Dr. Fernando Melendez. The Defendant further alleged that his inability to understand English, American behavior, and the American legal process, also made him incompetent to stand trial. The State had moved to strike the competency issue as one which could have been raised on direct appeal. The Court finds that as far as the claim alleges the ineffective assistance of counsel it is proper in a post-conviction motion. However, insofar as the claim raises "newly discovered evidence" of the Defendant's alleged incompetence, the proper remedy would be to file a petition for writ of error coram nobis in the Florida Supreme Court.

The Court finds that under the standards of *Strickland,* counsel was not ineffective for failing to raise a competency issue at the trial level. Carlos Rodriguez testified at the evidentiary hearing that he had no reason to believe that the Defendant was incompetent at trial. He testified that he had discussed strategy with the Defendant, that the

Defendant had not admitted the crime, and that he had lost his identification before the crime He also discussed with the Defendant his testimony. The Court further finds that the record of the trial proceedings refute any claim of incompetency. The Defendant's demeanor, testimony, and statements at trial reflect his understanding of the proceedings. There was no question by any of the parties of the Defendant's competency to stand trial. *See Pate v. Robinson,* 383 U.S. 375 (1966). Although an attorney should raise honest and debatable issues, he is not obligated to raise every conceivable issue, and certainly not when he regards the argument as futile because of its lack of merit. *Palmes v. State,* 425 So.2d 4 (Fla. 1983).

The Court further finds the Defendant's claim that because of his cultural background, he was unable to understand the American legal system, to be equally unmeritorious. The Court considered, but must discount, the testimony of Jorge Carro, who was qualified as an expert in Cuban law. Mr. Carro had never discussed with the Defendant the Defendant's understanding of the American legal system. The Court notes that the record reflects that the Defendant certainly understood the American system when he invoked his right to counsel when he was given his Miranda warnings at the police station after he was arrested. The record also reflects that the Defendant understood that in the United States, simply being accused of a crime does not mean he is guilty. Few criminal Defendants are well acquainted with the various nuances of the American criminal justice system. It is for exactly this reason that the system provides for counsel to assist defendants in their defense. The Defendant was assisted by effective counsel. His ethnic and cultural background did not make him incompetent to stand trial.

VII

COUNSEL'S INEFFECTIVENESS FOR FAILING TO RAISE THE ISSUE THAT THE JURY WAS INCORRECTLY ADVISED AND INSTRUCTED ON THE NUMBER OF JURORS REQUIRED TO RETURN A LIFE RECOMMENDATION (CLAIM EIGHT)

This Court has found that the issue of the correctness of the jury instruction has been waived. Moreover, the Court further finds that trial counsel was not ineffective under the standards of *Strickland, supra,* for failing to object to the jury instruction. The instruction as read to the jury was the standard jury instruction which has not been changed. The instruction is based in part on § 921.141(3), Florida Statutes, which has remained unchanged to this day, as well as by the Florida Supreme Court decisions. When read in their totality, the standard jury instructions are correct statements of the law. *See Harrich v. State,* 437 So.2d 1082 (Fla. 1982), and thus the trial counsel's actions in failing to object were not a serious deficiency below that of competent counsel. Furthermore, the Defendant failed to demonstrate that he was prejudiced by the instructions as delivered. The Court does not find a vote of eight to four for death to be a "slim majority."

VIII

THE DEATH SENTENCE WAS IMPOSED UPON THE DEFENDANT IN SUBSTANTIAL RELIANCE UPON AN UNCONSTITUTIONAL PRIOR CONVICTION (CLAIM TEN)

The Defendant alleged that his prior conviction for armed robbery was constitutionally invalid because his trial counsel who represented him in those proceedings provided

ineffective assistance of counsel, allegedly making the prior armed robbery conviction an "uncounseled" conviction, and therefore reliance on that conviction as a statutory aggravating circumstance violated his right to due process. The Court notes that no evidence was presented on this claim at the hearing, and as such the Court must reject it. The Court would not that even though the State questioned the statutory ability of the Office of the Capital Collateral Representative to represent the Defendant in a motion for post conviction relief concerning the prior conviction, the failure of defense counsel to attempt to substantiate this claim prevented the Court from determining who could properly represent the Defendant. The Court made no rulings which would have prevented the Defendant from pursuing this claim. Moreover, as noted by the State and defense counsel, the Florida Supreme Court has held that it is not appropriate to attempt to collaterally attack a defendant's prior conviction in a post conviction proceeding on a death sentence. *Mann v. State,* ____ So.2d ____, 10 FLW 47 (Fla. Supreme Court, February 1, 1986).

CONCLUSION

In conclusion, the Court having reviewed the claims and the evidence, finds that counsel did not render the Defendant the ineffective assistance of counsel at any portion of the proceedings, and that the Defendant's other claims were either waived or without merit and do not support an order vacating the Defendant's judgment and sentence. There is simply no credible evidence to support the Defendant's claims. Therefore, the Defendant's Motion to Vacate Judgment and Sentence is hereby DENIED. The Defendant shall have thirty (30) days to appeal this Order.

DONE AND ORDERED this 21st day of April, 1986, in chambers, Fort Lauderdale, Florida.

STANTON S. KAPLAN
CIRCUIT COURT JUDGE

Copies to:

Mark Olive, Esquire
Counsel for Defendant

Paul H. Zacks
Assistant State Attorney

Penny Brill
Assistant Attorney General

OMAR BLANCO, Appellant,

v.

STATE OF FLORIDA, Appellee.

Nos. 62371, 62598.

Supreme Court of Florida.

June 7, 1984.

Rehearing Denied July 26, 1984.

Defendant was convicted in the Circuit Court in and for Broward County, Stanton S. Kaplan, J., of first-degree murder and armed burglary, and he was sentenced to death for the murder and to 75 years for the armed robbery, and he appealed. The Supreme Court held that: (1) there was sufficient grounds for arrest of defendant; (2) trial court did not abuse its discretion in refusing to admit evidence of armed robbery; (3) reading of statements into record by trial court did not constitute central stage of trial mandating defendant's presence; (4) trial court did not err in allowing defendant to call witnesses against his trial counsel's advice; (5) showup identification procedure was not invalid; (6) record supported trial court's finding that lineup was extremely fair and that witness identified defendant without suggestibility; (7) trial court properly allowed suppressed statements to be admitted for impeachment purposes; (8) trial court did not err in instructing jury regarding burglary; (9) jury was properly instructed on unexplained possession of recently stolen property; (10) it was not error to convict and sentence defendant for both premeditated murder and burglary; and (11) there was no error in imposition of death sentence.

Affirmed.

1. Arrest 63.4(2)

Probable cause standard for law enforcement officer to make legal arrest is whether officer has reasonable grounds to believe arrestee has committed felony; standard of conclusiveness and probability is less than that required to support conviction.

2. Arrest 63.4(12, 17)

Description furnished officer over police BOLO, coupled with proximity in time and place to scene of crime, furnished reasonable grounds for officer's belief that defendant had committed the murder and rendered his arrest legal.

3. Hommicide 178(1)

In prosecution for murder and armed robbery, trial court did not abuse its discretion in refusing to admit evidence of armed robbery which had occurred two weeks before murder at issue and at home that was back to back with house where murder occurred, since defendant's theory that evidence of the robbery would tend to show that someone other than defendant committed murder was farfetched and unsupported.

4. Criminal Law 1153(1)

Trial judge's ruling on admissibility of evidence will not be disturbed absent abuse of discretion.

5. Criminal Law 338(1)

Test of admissibility is relevancy; to be admissible, evidence must be both logically and legally relevant.

6. Criminal Law 636(1)

Where trial court, in defendant's presence, had previously received testimony and heard arguments of counsel regarding defendant's motions to suppress evidence based on alleged illegality of arrest, reading of statements into record by trial court did not constitute central stage of trial mandating defendant's presence. West's F.S.A.RCrP Rule 3.180.

7. Criminal Law 641.10(3)

Trial court did not err in allowing defendant to call witnesses against his trial counsel's advice.

8. Criminal Law 339.6

Test for determining legality of out-of court identification is: did police employ any unnecessarily suggestive procedure in obtaining out-of-court identification; if so, considering all circumstances, did suggestive procedure give rise to substantial likelihood of irreparable misidentification.

9. Criminal Law 339.8(5)

Showup is inherently suggestive in that witness is presented with only one suspect for identification, but procedure is not invalid if it did not give rise to substantial likelihood of irreparable misidentification under totality of circumstances.

10. Criminal Law 339.8(6)

Identification made shortly after crime is inherently more reliable than later identification in court.

11. Criminal Law 339.8(5)

Showup identification procedure was not invalid, where no unnecessarily suggestive procedure was employed, and when witness made his identification at the scene, he was identifying only jogging suit and general profile of person he had seen and neither at hearing on motion to suppress nor at trial did witness identify defendant as person he had seen, specifying both times that he had not seen alleged assailant's head.

12. Criminal Law 339.8(3)

Record supported trial court's finding that lineup was extremely fair and that witness identified defendant without any suggestability.

13. Witnesses 390

Trial court, after finding that defendant's statements were freely and voluntarily made and were suppressed only because of the *Miranda* violation, properly allowed statements to be admitted for impeachment purposes.

14. Burglary 413(3)

Trial court, which read standard jury instructions, did not err in instructing jury regarding burglary, and there was circumstantial evidence from which jury could properly conclude that defendant entered home with intent to commit theft.

15. Burglary 46(7)

In view of testimony that defendant had purse under his arm which was subsequently found to contain witness' wrist

watch, there was evidence which would allow jury to find that defendant had recently stolen property in his possession, as required to support instruction on unexplained possession of recently stolen property.

16. Criminal Law 29,984(7)

It is not error to convict and sentence defendant for both premeditated murder and burglary when both have been charged and state has introduced sufficient evidence of premeditation to support murder conviction even had jury not returned burglary conviction.

17. Homicide 354

There was no error in using burglary and pecuniary gain as aggravating factors in imposing death sentence for conviction of first-degree murder.

18. Homicide 354

Defendant's previous conviction of another felony involving use of violence was properly considered aggravating factor in imposing death sentence for conviction of first-degree murder.

19. Homicide 354

Trial court erroneously applied heinous, atrocious, and cruel aggravating factor to circumstances of murder, where no additional acts setting crime apart from norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to victim, were shown beyond a reasonable doubt.

20. Criminal Law 1208.1(5)

Heinous, atrocious and cruel aggravating factor applies only to capital crimes the actual commission of which was accompanied by such additional acts as set the crime apart from norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to victim.

21. Homicide 354

Cold, calculated and premeditated aggravating factor was erroneously applied to murder, where there was no showing of heightened premeditation beyond reasonable doubt necessary to proper application of this factor, since reasonable interpretation of evidence was that defendant entered dwelling with intent to steal and was surprised by victim's attempt to take gun from him and subsequent shots followed quickly and did not show any heightened premeditation, calculation or planning.

22. Criminal Law 1208.1(4)

There was no error in trial court's imposition of death sentence based on two valid aggravating factors.

23. Criminal Law 1208.1(5)

Where there are one or more valid aggravating factors that support death sentence, and no mitigating circumstances to weigh against aggravating factors, death is presumed to be appropriate penalty.

Michael D. Gelety, Fort Lauderdale, for appellant.

Jim Smith, Atty. Gen. and Marlyn J. Altman, Asst. Atty. Hen., West Palm Beach, for appellee.

PER CURIAM.

The appellant, Omar Blanco, appeals his convictions for first-degree murder and armed burglary and the imposition of the death sentence and a separate sentence for burglary. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

Fourteen-year-old Thalia Vezos testified that at approximately 11 p.m. on January 14, 1982, she was in her bed reading at her home in Ft. Lauderdale when she was a man standing in the hallway holding a gun and carrying a brown wallet-type object under his arm. The intruder indicated that Thalia was to keep quiet. He then cut the wires to her telephone and left the room. Thalia's uncle, John Ryan, appeared in the hall and tried to take the gun from the intruder. Ryan was shot in the scuffle and landed on top of his niece on the bed. The intruder shot Ryan six more times. The intruder then fled. Thalia ran next door to the home of the Wengatzes, where the police were called.

The police arrived at the crime scene at 11:14 p.m. Officer Bull went next door and spoke to Thalia, who described the intruder as a Latin male, between 5'8" to 5'10", 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair. Officer Bull sent the description to a dispatcher at approximately 11:24 p.m. A man who lived across the street, George Abdeni, came forward with a report that he had heard shots and screaming and had seen the profile of a person in a gray jogging suit heading east from the Vezos property. This information was contained in a police BOLO that included the fact that the suspect was proceeding eastward.

The BOLO as dispatched described the suspect as a Latin male about 5'10" in height with a dark complexion, black curly hair, some kind of mustache, wearing a gray or light green jogging suit, and running in an eastwardly direction.

Officer Price, who was in the area, positioned his car approximately one and a half miles from the scene in a driving lane facing east on 30th Street next to North AIA to watch for someone fitting the BOLO description. At approximately 11:57 p.m. he saw appellant riding a white bicycle on the sidewalk southbound on AIA and determined that appellant fit the description on the BOLO except for his pants, which at first appeared to be heavy corduroy. He also had full facial hair. Officer Price requested more information. He then followed appellant for approximately one-tenth of a mile before stopping him. The first thing the officer noticed when he got within three to four yards of appellant was that he gray pants were the same material as the top of the sweatsuit. Officer Price requested a backup unit. He asked appellant if he possessed a gun Appellant replied, "No Ingles." The officer frisked appellant, but found nothing but a necklace and watch which appellant was wearing. When the backup unit arrived, the officers handcuffed appellant and took him to the murder scene. Mr. Adbeni identified appellant as having the same profile and jogging suit as the figure he had seen earlier. Appellant was then formally arrested.

A man's purse containing appellant's ID papers and a watch belonging to Thalia Vezos was found near the door to Thalia's bed room.

On the day following the murder, Thalia Vezos identified appellant in a lineup as the perpetrator. The Broward County Grand Jury indicted appellant on February 2, 1982, for the first-degree premeditated murder and for armed burglary. Trial began on June 1, 1982, and the jury found appellant guilty on both counts. In compliance with the jury's recommended verdict, the trial judge sentenced appellant to death for the murder. He was sentenced to 75 years for the armed burglary.

[1,2] Appellant first argues that the trial court erred in failing to suppress evidence derived from appellant's arrest in that the information Officer Price received over the BOLO did not furnish sufficient grounds to justify the initial investigative stop. Appellant further argues that, regardless of the legality of the initial stop, the de facto arrest was illegal because there was no probable cause to believe appellant had committed the murder. We disagree. The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction. *Shriner v. State,* 386 So.2d 525 (Fla. 1980), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981). We find that the description furnished Officer Price over the BOLO, coupled with the proximity in time and place to the scene of the crime, furnished reasonable grounds for the officer's belief that appellant had committed the murder and rendered the arrest legal. The motion to suppress was properly denied. There were sufficient grounds for the arrest; ergo there were grounds for the stop.

[3-5] Appellant next contends that the trial court erred in refusing to admit evidence of an armed robbery which had occurred two weeks before the murder in the present case, and at a house that is back to back with the house where the murder occurred. The trial judge determined that the defense hypothesis that the evidence of the robbery would tend to show someone other than the accused committed the murder was speculative and irrelevant. We agree and find no abuse of discretion. Appellant's theory is farfetched and unsupported. Thalia did not recognize the photographs of any of the robbers and she positively identified appellant as the murderer of her uncle. Appellant has failed to present any reasonable theory which the admission of evidence of the robbery would have tended to exculpate him. A trial judge's ruling on the admissibility of evidence will not be

disturbed absent an abuse of discretion. *Booker v. State,* 397 So.2d 910 (Fla.), *cert. denied,* 454 U.S. 957 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). The test of admissibility is relevancy. *Johnson v. State,* 130 So.2d 599 (Fla. 1961). To be admissible, evidence must be both logically and legally relevant. *Wolfe v. State,* 72 Fla. 572, 73 So.740 (1917)

[6] Appellant next argues that the trial court erred in making statements on the record in appellant's absence to explain a ruling it had made on the legality of appellant's arrest. In appellant's presence the trial court had previously received testimony and heard arguments of counsel regarding appellant's motions to suppress evidence based on the alleged illegality of the arrest. We find that under these circumstances the reading of statements into the record by the trial court did not constitute an essential stage of the trial mandating appellant's presence. *See* Fla.R.Crim.P. 3.180.

[7] Appellant argues that the trial court erred in allowing him to call witness against his trial counsel's advice, thereby interfering with the presentation of his defense. Trial counsel explained several times to appellant that he considered it not to be in appellant's best interests to call the witnesses, but appellant insisted. The record reflects, and appellant concedes in his brief, that he was told that the witnesses' testimony would be detrimental to his case. The trial court finally ruled in favor of allowing appellant to present to the jury whatever evidence appellant felt was beneficial. Under these circumstances, the trial court did not err in allowing appellant to present witnesses. The ultimate decision is the defendant's. *Milligan v. State,* 177 So.2d 75 (Fla. 2d DCA 1965).

[8-11] Appellant contends that the trial court erred in denying his motion to suppress the identification testimony

of George Abdeni and Thalia Vezos. The test for determining the legality of an out-of-court identification is:

> (1) did the police employ any unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

Grant v. State, 390 So.2d 341, 343 (Fla. 1980), *cert. denied,* 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981). In the case of Abdeni, a showup identification procedure was used. A showup is inherently suggestive in that a witness is presented with only one suspect for identification, but the procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances. *State v. Cromartie,* 419 So.2d 757 (Fla. 1st DCA), *petition dismissed,* 422 So.2d 842 (Fla. 1982). Further, we are mindful that "an identification made shortly after the crime is inherently more reliable than a later identification in court," *State v. Freber,* 366 So.2d 426, 428 (Fla. 1978). We agree with the trial court that no unnecessarily suggestive procedure was employed in this instance. When Abdeni made his identification at the scene, he was identifying only the jogging suit and general profile of the person he had seen. Neither at the hearing on the motion to suppress nor at trial did Abdeni identify appellant as the person he had seen, specifying at both times he had not seen the alleged assailant's head. We find no error.

[12] Regarding the testimony of Thalia Vezos, appellant argues that the lineup at which she identified appellant as the perpetrator was unnecessarily suggestive in that the other persons in the lineup were physically dissimilar to appellant, creating a substantial likelihood of misidentification. We do not agree with appellant. The record supports

the trial court's finding that the lineup was extremely fair and that Thalia identified appellant without any suggestability. Appellant was number one in the lineup on the day following the murder, and the police had to restrain her from making an immediate identification. Thalia had ample opportunity to view the perpetrator at the time of the crime, when, according to her testimony, he was within her view for approximately ten minutes. We find under the totality of the circumstances that the out-of-court identification of appellant by Thalia was admissible, as was her in-court identification based on her ability to observe appellant at the crime scene. *See Lecoin v. State,* 418 So.2d 336 (Fla. 3rd DCA 1982).

[13] Appellant argues that the trial court erred in allowing the jury to hear certain statements he made to the police, which had been ordered suppressed because of *Miranda* violations. Appellant chose to take the stand, putting his credibility at issue and opening the door for the statements to be used to impeach his testimony. We held in *Nowlin v. State,* 346 So.2d 1020, 1024 (Fla. 1977), that

> whenever the state, in order to impeach a defendant's credibility, chooses to present evidence of a defendant's incriminating statements which are inconsistent with trial testimony of the defendant and which are inadmissible in the case-in-chief because of the failure of custodial officers to give *Miranda* warnings, the statements must be shown to be voluntary before they made be admitted.

The trial court in the present case found that appellant's statements were freely and voluntarily made and were suppressed only because of the *Miranda* violation. We affirm the trial court in allowing the statements to be admitted for impeachment purposes.

[14] We find no merit in appellant's argument that the trial court erred in instructing the jury regarding burglary. The trial court read the Florida Standard Jury Instructions (Criminal, Vol. II, 1981). There was circumstantial evidence from which the jury could properly conclude that appellant entered the Vezos home with the intent to commit theft.

[15] Appellant also argues that the jury was erroneously instructed on the unexplained possession of recently stolen property, because appellant had no recently stolen property on his person at the time of his arrest. This point has no merit. Thalia Vezos testified that appellant had a purse under his arm. The purse subsequently was found to contain Thalia's wristwatch. There was therefore evidence which would allow the jury to find that appellant had had recently stolen property in his possession.

[16] Appellant claims the trial court erred in sentencing him separately for the burglary, because the first-degree murder conviction was based on the felony murder theory, there being no premeditation. This argument is meritless. Appellant was indicted for premeditated murder, the jury was instructed on premeditated murder, and the evidence supported premeditated murder. It is not error to convict and sentence a defendant for both premeditated murder and burglary when both have been charged and the state has introduced sufficient evidence of premeditation to support the murder conviction even had the jury not returned the burglary conviction. *Breedlove v. State,* 413 So.2d 1, 8(Fla.), *cert. denied,* 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed. 2d 149 (1982).

Appellant also challenges the imposition of the death sentence. The trial court based the sentence upon a finding of four statutory aggravating factors and no mitigating factors. The factors of pecuniary gain and committing a capital felony during the commission of a burglary were considered as but one of the four aggravating factors. The

other aggravating factors found by the trial court were that the defendant had previously been convicted of another felony involving the use of violence, that the crime was especially heinous, atrocious, or cruel, and that it was committed in a cold, calculated and premeditated manner.

[17, 18] We find no error in using burglary and pecuniary gain as one factor. *Provence v. State,* 337 So.2d 783 (Fla. 1976), *cert denied,* 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). The factor of the prior conviction was properly considered by the trial court. In the interim between the trial court's sentencing order and oral argument before this Court, the prior conviction was reversed. *Blanco v. State,* 438 So.2d 404 (Fla. 4th DCA 1983). Recently appellant was reconvicted on March 14, 1984. To remand for resentencing under these circumstances would be pointless in light of the fact that the judge could again consider the conviction as an aggravating factor. We find no reversible error.

[19, 20] We find that the trial court erroneously applied the heinous, atrocious, and cruel factor to the circumstances of this murder. This factor applies only to "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 283 So.2d 1,9 (Fla. 1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). This factor was not shown beyond a reasonable doubt in the present case. *See e.g. Lewis v. State,* 377 So.2d 640 (Fla. 1970) and *Kampff v. State,* 371 So.2d 1007 (Fla. 1979).

[21] The cold, calculated and premeditated factor was likewise erroneously applied. Although there was evidence of premeditation sufficient to support a finding of premeditated murder, there was no showing of heightened premeditation beyond a reasonable doubt necessary to the

proper application of this factor. A reasonable interpretation of the evidence is that appellant entered the dwelling with the intent to steal and was surprised by Ryan's attempt to take the gun from him. The subsequent shots followed quickly and do not show any heightened premeditation, calulation, or planning. *See Richardson v. State,* 437 So.2d 1091 (Fla. 1983). *Compare Hill v. State,* 422 So.2d 816 (Fla. 1982), *cert. denied,* 460 U.S. 1017,. 102 S.Ct. 1262, 75 L.Ed.2d 488 (1983).

The trial court found no mitigating factors. The defense presented no evidence in mitigation, and specifically waived the mitigating circumstances of no significant history of prior criminal activity; the defense may reasonably have thought it would be a fruitless effort to present evidence as to this circumstance, having stipulated to be prior conviction.

[22, 23] The jury recommended imposition of the death sentence. The trial court found two valid aggravating factors. Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty. *White v. State,* 446 So.2d 1031 (Fla. 1984); *Armstrong v. State,* 399 So.2d 953 (Fla. 1981); *State v.Dixon.* Moreover, we have compared this case with all past capital cases and have determined that the imposition of the death sentence in this case is not comparatively disproportionate. We find no error in the trial court's imposition of the death sentence.

The convictions and sentences for first-degree murder and armed burglary are affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

IN THE CIRCUIT COURT OF
THE 17TH JUDICIAL IN AND
FOR BROWARD COUNTY,
FLORIDA

CASE NO. 82-453CF

STATE OF FLORIDA,

vs. **SENTENCE**

OMAR BLANCO,

Appellee.

_____/

On June 11, 1982, you, OMAR BLANCO, were found guilty by a jury of your peers of the offense of Murder in the First Degree as to Count I of the Indictment, and guilty of Burglary While Armed as to Count II of the Indictment. At that time, you were adjudged guilty by the Court as to those two (2) offenses.

On June 15, 1982, a separate sentencing proceeding was conducted before the Trial Jury to determine whether you should be sentenced to death or life imprisonment, as authorized by Florida Statute 775.082. Counsel for the State, State Attorney, Michael Satz, argued to the Jury and recommended the imposition of the death penalty. One (1) of your lawyers, Carlos Rodriguez, argued before the Jury recommending the imposition of a life sentence.

After hearing the arguments of Counsel and instructions from the Court, the Jury deliberated and returned an Advisory Sentence recommending death as to Count I of the Indictment as to Murder in the First Degree.

Pursuant to the provisions of Florida Statute 921.141(3), this Court hereby makes the following findings of fact:

AS TO THE AGGRAVATING CIRCUMSTANCES

(1) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT;

This aggravating circumstances does not apply in this case.

(2) THAT AT THE TIME OF THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED, THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE, OR OF A FELONY INVOLVING THE USE OF VIOLENCE TO SOME PERSON;

This aggravating circumstance does apply in this case. The Defendant, OMAR BLANCO, was previously convicted of an Armed Robbery which is a felony involving the use of violence to some person. The Defendant, OMAR BLANCO, was also previously convicted of an Armed Burglary at the same time he was convicted of the Armed Robbery, however, the Court will not consider the Armed Burglary in this instance as another felony involving the use of violence to some person.

(3) THAT THE DEFENDANT, IN COMMITTING THE CRIME FOR WHICH HE IS TO BE SENTENCED, KNOWINGLY CREATED A GREAT RISK OF DEATH TO MAY PERSONS;

This aggravating circumstance does not apply in this case.

(4) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF ANY ROBBERY, SEXUAL BATTERY, ARSON BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB;

This aggravating circumstance does apply in this case. The Defendant, OMAR BLANCO, was engaged in the commission of an Armed Burglary at the time he committed the First Degree Murder of JOHN RYAN.

(5) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY;

This aggravating circumstance does not apply in this case.

(6) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR PECUNIARY GAIN;

This aggravating circumstance does apply in this case. The Defendant, OMAR BLANCO, entered or remained in the premises with the intent to commit a Theft therein, as was evidenced by the watch of THALIA VEZOS, being found in the Defendant, OMAR BLANCO'S purse on the premises which was burglarized.

(7) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS;

This aggravating circumstance does not apply in this case.

(8) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ARTROCIOUS OR CRUEL;

This aggravating circumstance applies in this case. The evidence indicated that the victim, JOHN RYAN, did attempt to wrestle the gun away from the Defendant, OMAR BLANCO, and was shot at least one (1) time during such attempt. The victim then staggered away from the Defendant, OMAR BLANCO, and continued to fire his weapon at the victim causing additional bullets to enter the victims body for a total of seven (7). This Court feels that it is necessary to mention that JOHN RYAN, while being fired upon by the Defendant, OMAR BLANCO, did throw his body upon THALIA VEZOS, his fourteen (14) year old niece, and while lying on top of her did continue to receive bullets in his body, the thud of one (1) of the bullets entering the victims body being felt by THALIA VEZOS. The bullets could easily have penetrated the victims body and caused great bodily harm or death to THALIA VEZOS, creating a great risk of death to her.

(9) THAT THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION;

This aggravating circumstance applies in this case. The evidence introduced from the Assistant Medical Examiner, DR. KEENE GARVIN, indicated that only one (1) bullet entrance wound contained evidence of extremely close contact of

the weapon with the body of the victim. Dr. Garvin indicated that that wound entered the jaw area of the victim and was not mortal wound. The evidence further indicated from THALIA VEZOS, the eye witness, that the first shot occurred in a hallway outside her bedroom door. The victim was in extreme close proximity to the Defendant, OMAR BLANCO, and was struggling with the Defendant, OMAR BLANCO, for the weapon. This would allow a reasonable person to believe that the first wound incurred by the victim was the close range non-mortal wound. The continued firing of the weapon by the Defendant, OMAR BLANCO, certainly indicates a cold, calculated and premeditated intention to snuff out the life of the victim, JOHN RYAN, for absolutely no moral, legal or other justification.

AS TO MITIGATING CIRCUMSTANCES

(1) THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY;

This mitigating circumstance does not apply in this case.

(2) THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE;

This mitigating circumstance does not apply in this case.

(3) THAT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT;

This mitigating circumstance does not apply in this case.

(4) THAT THE DEFENDANT WAS AN ACCOMPLICE IN THE OFFENSE FOR WHICH HE IS TO BE SENTENCED BUT THE OFFENSE WAS COMMITTED BY ANOTHER PERSON AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR;

This mitigating circumstance does not apply in this case.

(5) THAT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON;

This mitigating circumstance does not apply in this case.

(6) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED;

This mitigating circumstance does not apply in this case.

(7) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME;

This mitigating circumstance does not apply as Defendant, OMAR BLANCO, was thirty-one (31) years of age at the time of the offense.

In summary, the Court finds that of the nine aggravating circumstances, four (4) were applicable in this case. Aggravating circumstances four (4) and six (6) are considered by this Court as only one. As to the mitigating circumstances, none applied in this case.

Based upon the preceding opinions of fact and it being the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court after weighing the aggravating and mitigating circumstances, and being of the additional opinion that no mitigating circumstances exist to outweigh the aggravating; it is therefore,

As to Count I, IT IS THE SENTENCE OF THIS COURT, that you, OMAR BLANCO, be sentenced to death for the murder of JOHN RYAN, as alleged in Count I of the Indictment.

As to Count II, IT IS THE SENTENCE OF THIS COURT, that you, OMAR BLANCO, be confined *by* the Department of Corrections in an appropriate institution for seventy-five (75) years for the Armed Burglary as alleged in Count II of the Indictment.

The Court does hereby impose a mandatory minimum of three (3) years imprisonment without the possibility of parole pursuant to Florida Statute 775.087(2)(b). The Court further retains jurisdiction over the sentence as to Count II for one-third (1/3) or twenty-five (25) years in order to review any release order for parole in accordance with Florida Statute 947.16(3).

The Court does hereby retain jurisdiction and makes the following specific findings:

1. The Defendant, OMAR BLANCO, has been convicted of numerous felonies involving violence, including Murder in the First Degree, Armed Robbery, and Armed Burglary.

2. The crime committed involved the use of a firearm.

3. Despite the jury's verdict finding the Defendant, OMAR BLANCO, guilty, and the overwhelming and uncontradicted evidence clearly demonstrating his guilt, the Defendant,

OMAR BLANCO, has consistently refused to acknowledge his deeds, and has shown absolutely no remorse whatsoever for the crimes that he committed.

4. That during the sentencing phase of the trial for Murder in the First Degree, the Defendant, OMAR BLANCO, indicated he did not care if the jury returned an advisory sentence of life or death. This expression by the Defendant, OMAR BLANCO, indicates to this Court that the Defendant, OMAR BLANCO'S, lack of concern for his own life manifests that he would be a dangerous person to return to society. The Defendant, OMAR BLANCO'S, attitude also corroborates his prior exhibitions of utter disregard for the rights and safety of members of society.

5. The Court believes that it is in the best interest of society that the Defendant, OMAR BLANCO, remain incarcerated for at least one-third (1/3) of the sentence impose. The Courts right to the invocation of retention of jurisdiction is to insure that the Defendant, OMAR BLANCO, serves an appropriate term of incarceration.

The Defendant, OMAR BLANCO, is to receive credit for one hundred fifty-nine (159) days time served.

EACH SENTENCE TO BE CONSECUTIVE.

It is further ORDERED that you, OMAR BLANCO, be taken by the proper authorities to the Florida State Prison and there be kept in close confinement until the day of your execution and that on the day set for your execution you be put to death by electrocution, which is the manner prescribed by law.

You, OMAR BLANCO, are hereby notified that you have thirty (30) days from this date within which to appeal the Judgement and Sentence. The Judgment of Conviction and the Sentence of death is subject to automatic review by the Supreme Court of Florida. You are further advised that you

have the right to the assistance of counsel in the filing and preparation of your appeal, and by this Order this Court appoints the Public Defender of the Seventeenth Judicial Circuit in and for Broward County to handle your appeal, you having previously been found indigent by this Court.

DONE AND ORDERED in Open Court, Broward County Courthouse, Fort Lauderdale, Florida, this 21st day of June, 1982.

STANTON S. KAPLAN, Circuit Judge

CONSTITUTION AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section I of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No person shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or properly, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Codes Section 1254(1) provides as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree:

Title 28, United States Code, Section 2254, provides in the pertinent parts:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant of the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed

to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraph numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.

Rule 8 of the Rules of Governing Habeas Corpus Proceedings provides in the pertinent part:

> If the Petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of State court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required.

Section 921.141, Florida Statutes (1981) provides in the pertinent parts:

> (1) Separate proceedings on issue of
>
> PENALTY – Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by 775.082. The proceeding shall be conduct by the

trial judge before the trial jury as soon as practicable....In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which out weigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. —Notwithstanding the recommenda-

tion of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as to enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with 775.082.

* * *

(5) AGGRAVATING CIRCUMSTANCES. — Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES. — Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participating was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Section 947.16, Florida Statutes, provides in the pertinent parts:

(3) Persons who have become eligible for parole and who may, according to the objective parole guidelines of the commission, be granted parole shall be placed on parole in accordance with the provisions of this law; except that, in any case of a person convicted of murder, robbery, burglary of a dwelling or burglary of a structure or conveyance in which a human being is present, aggravated assault, aggravated battery, kidnapping, sexual battery or attempted sexual battery, incest or attempted incest, an unnatural and lascivious act or an attempted unnatural and lascivious act, lewd and lascivious behavior, assault or aggravated assault when a sexual act is completed or attempted, battery or aggravated battery when a sexual act is completed or attempted, arson, or any felony involving the use of a firearm or other deadly weapon or the use of intentional violence, at the time of sentencing the judge may enter an order retaining jurisdiction over the offender for review of a

commission release order. This jurisdiction of the trial court judge is limited to the first-third of the maximum sentence imposed. When any person is convicted of two or more felonies and concurrent sentences are imposed, then the jurisdiction of the trial court judge as provided herein shall apply to first-third of the maximum sentence imposed of the highest felony charged and proven. When any person is convicted of two or more felonies and consecutive sentences are imposed, when the jurisdiction of the trial court judge as provided herein shall apply to one-third of the total consecutive sentences imposed.

(a) In retaining jurisdiction for the purposes of this act, the trial court judge shall state the justification with individual particularity, and said justification shall be made a part of the court record.

Supreme Court, U.S.
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NO. 91-1417

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

OMAR BLANCO,

Respondent/Cross-Petitioner,

vs

HARRY K. SINGLETARY, as
Secretary, Department of Corrections
State of Florida,

Petitioner/Cross-Respondent.

RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNSELS FOR PETITIONER/
CROSS RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DENYING HABEAS CORPUS RELEIF ON THE CLAIM THAT THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH THE DEFENSE IN ALLOWING BLANCO TO CALL WITNESSES IN HIS OWN BEHALF SUCH THAT PREJUDICE SHOULD BE PRESUMED.

II. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DETERMINING THAT NO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WERE UTILIZED SUCH AS TO INDUCE THE WITNESSES TO MAKE A MISTAKEN IDENTIFICATION.

PRELIMINARY STATEMENT

ON March 4, 1992, counsel for Petitioner/Cross-Respondent received the Cross-Petition for Writ of Certiorari filed on behalf of Respondent/Cross-Petitioner, Omar Blanco. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the instant response is timely filed.

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STATEMENT OF THE CASE

In order to place the questions presented to this Court in their proper context, it is necessary to provide this Court with the following specific facts regarding Question I:

At trial, BLANCO was presented by two attorneys, Don Tenbrook and Carlos Rodriquez. After two defense witnesses had testified, Tenbrook stated on the record that it was their tactical decision not to call Fidel Romero and Enrique Gonzales as witnesses and that they had tried to explain this to BLANCO (R. 1413).[1] Tenbrook stated that it was BLANCO who asked him to bring this matter to the trial court's attention (R. 1413). The trial court then told counsel it would be helpful to proffer what the testimony of the witnesses would be (R. 1413). Because there was a question as to who had the final say on calling witnesses, the trial court suggested that defense counsel have further discussions with BLANCO. Defense counsel Rodriquez stated he would continue to talk to BLANCO, in that Tenbrook could not talk directly to BLANCO because of the language barrier (R. 1415).

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1 "R." refers to the record of the trial proceedings. The pagination is that of the record submitted to the Florida Supreme Court on direct appeal. This record on appeal was made part of the record in the federal proceedings and was reviewed by the District Court and Court of Appeals. The Eleventh Circuit's opinion did not employ the symbol "R." but used "Trial transcript" when referring to the trial record.

BLANCO then took the stand in his own defense. BLANCO denied committing the crime and also denied that the bicycle which police stopped him on the night of his arrest, was the bicycle which he was riding when he was arrested (R. 1441). After BLANCO'S testimony, there was a bench conference held off the record at which time all parties agreed to recess at that time for lunch (R. 1442).

After the lunch recess, Tenbrook again stated that it was not his intention to call the other two witnesses, which BLANCO wanted to be called (R. 1446-1447). Rodriquez explained that he discussed with BLANCO the detriment they felt the testimony might have, but he was still of the same state of mind (R. 1448-1449). The trial court then stated that unless BLANCO had an automatic right to call any witnesses he wanted, the court would have to make a determination if BLANCO was competent to handle the case himself, with the assistance of the attorneys (R. 1452-1453).

The trial court, through the official interpreter, asked BLANCO if he had understood what had been said by the court and what his attorneys had told him (R. 1454-1455). BLANCO then stated when asked if he was satisfied with his attorneys, that he was "regular." BLANCO explained that he was angry with them before because of the problem with the witnesses, but he was "okay with them now." (R. 1455). BLANCO then stated in addition to the two witnesses previously mentioned, he had three other witnesses he wanted to call (R. 1456). BLANCO after being asked by the trial court, stated that his attorneys had talked to him about the additional witnesses and was told they would be detrimental for him (R. 1456-1457). BLANCO still insisted that the witnesses be called.

The trial court then asked BLANCO if his counsel told him why the witnesses would be bad. The court specifically stated that it did not want to know what counsel told him (R. 1457). BLANCO replied that counsel had not told him why (R. 1457). The trial court asked Rodqiquez to explain to BLANCO again why the witnesses would be detrimental (R. 1459).

At that point, BLANCO filed a motion to have the attorneys withdrawn, stating that he had a conflict of interest because counsel refused to call the witnesses, and because counsel did not do in court what they had told him privately they would do (R. 1459-1460). At that point, the trial court began an inquiry into the motion.

During the inquiry, BLANCO complained that Rodriquez was lying to him (R. 1461). The trial court asked BLANCO, without divulging anything that might be confidential, what he was alluding to (R. 1462). BLANCO stated that Rodriquez hadn't reviewed the questions with him before he testified, and that Rodriquez told him he did not have to testify because the evidence the defense was going to present was enough. BLANCO stated that he wanted to testify, and wanted his other witnesses to testify (R. 1462). BLANCO then went on to state why he wanted the witness Martinez called, i.e., to testify about what he knew of BLANCO. (R. 1463). BLANCO complained about the testimony of Rey Alonso (R. 1464). Rodriquez explained that he did not differentiate to BLANCO the distinction between a defense and state witness because BLANCO had indicated that he wanted Alonso called (R. 1465). Rodriquez also explained that Romero and Gonzales' testimony would be beneficial in part by verifying some of BLANCO'S testimony, but would be of limited benefit because of conflicts in their testimony (R. 1465-1466). Rodriquez

further explained that the testimony of Martinez would have been relevant to only collateral matters, and would be cumulative (R. 1466). Rodriquez acknowledged that although he tried to contact Martinez, he did not tell BLANCO he was unsuccessful (R. 1466).

The trial court then asked BLANCO if counsel had advised him that they felt it would be in his best interest if he, himself testified. BLANCO said yes, that they told him why, but he decided to testify anyway. (R. 1467-1468). The trial court stated that because counsel indicated that the other witnesses would have some testimony which was beneficial, then it was incumbent upon counsel to accept BLANCO'S position and put the witnesses on (R. 1468-1469).

At that point, both Tenbrook and Rodriquez moved to withdraw. Tenbrook stated that he would feel that he was not rendering effective assistance of counsel if his independent judgment would be limited. (R. 1469). At that point, the trial court asked counsel to get the witnesses to be presented. (R. 1470). When Rodriquez indicated he could not serve witness, Barbara Lazo (R. 1471), the trial court allowed BLANCO to try to call her to get her there. (R. 1472). Further conversations ensued between the court, counsel and BLANCO about attempts to reach the other witnesses. (R. 1473-1474). Rodriquez explained that he could see no reason to call the witness Carmen Alonso. He stated that she could not corroborate any of the testimony. (R. 1476). Rodriquez explained that he told BLANCO what she said in her deposition, but did not read it to him word by word. (R. 1476). BLANCO stated that Rodriquez did tell him that she would be nervous, did not want to be a witness, and everything that she had said. (R. 1477). When the trial court asked if there was anything Carmen Alonso could say that he felt would be in his

best in interest, BLANCO stated that nobody could do him any harm (R. 1477), and that she would have shown that Rey Alonso was lying. (R. 1478).

The trial court tried to explain to BLANCO about the rules of evidence concerning hostility to his own witnesses. (R. 1479). BLANCO stated that he did not call Rey Alonso, but the state had called him. (R. 1480). Rodriquez stated that he did not tell BLANCO that Alonso was a state witness, and that BLANCO had indicated he wanted Alonso called. (R. 1480).

BLANCO again expressed his dissatisfaction with his lawyers. (R. 1482). The trial court denied the motion to withdraw, and stated that the court felt BLANCO had had competent counsel. (R. 1482). The court again stated that BLANCO would have the right to call his witnesses, and asked defense counsel to contact them. (R. 1483).

Fidel Romero and Enrique Gonzales, then testified in BLANCO'S behalf. Both testified about looking for BLANCO'S papers (R. 1497, 1511) and how BLANCO had a bicycle. (R. 1495, 1512). After the testimony, the court asked counsel about getting the other witnesses. (R. 1523). Rodriquez explained to the court what his efforts had been. Included were the efforts to serve BLANCO'S brother, Rodolfo, who BLANCO also wanted called. (R. 1524). BLANCO indicated that he could also try to get the witnesses there by phone. The trial court ordered that BLANCO get all the calls he needed. (R. 1525). Rodriquez stated he would give BLANCO his home number, Tenbrook stated that he could not, because he did not speak Spanish. (R. 1526). BLANCO stated he was very happy. (R. 1528). Rodriquez went to try to contact the witnesses, while Tenbrook handled the charge conference. (R. 1528).

The next morning, the trial court asked Rodriquez about his efforts in locating the witnesses. (R. 1616). Rodriquez explained how he had talked to BLANCO'S brother, who said he would be there (R. 1617), that he tried to contact Barbara Lazo, but could only leave a message (R. 1618-1619), that he talked to someone who knew Theodoro Martinez, and left a message to contact him. (R. 1620). The court told Rodriquez to try to contact them again (R. 1620). BLANCO then stated what his efforts were to contact the witnesses (R. 1622), including that the home where his brother lived, would not accept the call from him (R. 1623), that he talked to Martinez, who said he would not come voluntarily and would not take BLANCO'S word that he had to be there (R 1624-1625), that he left a message for Barbara Lazo (R. 1627), and that Carmen Alonso's phone was disconnected. (R. 1628).

Rodriquez then came back to the courtroom and informed the court that he called Barbara Lazo's residence and was told she was not there. He left a message. (R. 1629). The same with BLANCO'S brother. (R. 1629-1630). He also left a message at Martinez's place of employment. (R. 1630). The trial court then asked BLANCO what he believed the witnesses would testify to. (R. 1633). BLANCO stated that Lazo would testify as to BLANCO'S physical description (R. 1633), and how long he knew Rey Alonso. (R. 1634). BLANCO stated that he did not know what Carmen Alonso would testify to but expected her to tell the truth about how long she knew him and Rey Alonso. (R. 1636). BLANCO stated that he wanted his brother to testify as to his physical appearance and whether he had seen him with the purse. (R. 1636-1637). As to Theodoro Martinez, BLANCO stated he was going to ask him about when he lived in Hollywood. (R. 1637).

The trial court then asked counsel why they did not want to call the witnesses. Tenbrook referred the court to Barbara Lazo's deposition, that she did not know BLANCO very well. (R. 1640-1641). Rodriquez stated that Martinez was BLANCO'S sponsor when he came into the country, but was not aware of any recent knowledge of BLANCO. (R. 1642). The trial court asked Rodriquez, without violating any privileged communications, whether he was apprised of anything special that Martinez could have testified to, to aid BLANCO. Rodriquez stated no. (R. 1642-1643). The trial court then found that substantial efforts had been made to find the witnesses, but it seemed that no one wanted to cooperate with BLANCO. (R. 1643). The trial court noted that any testimony would probably be cumulative. (R. 1644-1647).

After the verdict was reached, the trial court wanted to continue with the sentencing. (R. 1753). Defense counsel asked for a short continuance. The trial court stated if the jurors agreed to come back it would be all right. (R. 1753-1754). The trial court then informed the jury that the defense indicated that there may be some people they would want to present but who were not then available to testify, and asked if the jury had any problems returning in a few days to allow the defense to find the witnesses. (R. 1759).

At the charge conference, the trial court asked both the state and defense counsel what evidence they were going to present. Rodriquez explained that he talked with BLANCO about calling additional witnesses, specifically his brother and that BLANCO did not want to call his brother. (R. 1780, 1781). Rodriquez explained to BLANCO why he wanted to call his brother, i.e., family background, emotional state. (R. 1782). BLANCO indicated he did not want his brother called. (R. 1782).

Rodriquez then told the court that he was considering calling an expert on linguistics and Latin cultures to testify about some type of cultural shock or mitigating circumstances along these lines. (R. 1782). Rodriquez stated he did not think that type of testimony or argument would be effective, that it would be ridiculed. (R. 1783). In addition, Rodriquez agreed with court's feeling that it would not be compatible with BLANCO'S assertion that he did not kill anyone. (R. 1783). Rodriquez stated that he told that to BLANCO and explained it again. (R. 1783-1784). BLANCO stated that he understood and did not want to call anyone. (R. 1784).

Rodriquez and BLANCO discussed calling a psychiatrist, and they agreed not to call one. Rodriquez saw no evidence of any competency, insanity or emotional duress problems that would constitute a mitigating factor. (R. 1784-1785). The court asked if there were anyone else. BLANCO stated nobody. (R. 1785). Rodriquez stated he explained the nature of the sentencing phase to BLANCO and what evidence he could present. (R. 1785). Rodriquez stated the only witness he would want to call was possibly, BLANCO'S brother, but because his brother had shown a lack of regard in appearing at trial, he did not think his brother's testimony would be beneficial. (R. 1786). The court asked BLANCO if his brother showed up would he want him to testify. BLANCO stated "nada." (R. 1788).

Rodriquez explained that he told BLANCO he had a right to testify in his own behalf. BLANCO gave a preliminary indication that he did not want to. BLANCO stated he explained himself on the stand, and he really did not have much else to say. (R. 1788). Rodriquez explained that BLANCO only had to say something about himself, his background, and what

he would want the jury to recommend. BLANCO indicated that he didn't really care what they recommended. (R. 1789).

After the jury's recommendation of death, BLANCO again indicated he did not wish to speak in his own behalf. (R. 1863). Tenbrook argued against the death penalty, objecting to the court's finding that killing was especially cruel, heinous and atrocious and that the killing was cold, calculated and premeditated. (R. 1863-1864). Tenbrook argued that this was an unfortunate killing in the course of a burglary, but nothing in the facts set it apart from the normal, capital felonies. (R. 1865). BLANCO then stated that he was not responsible for the crimes and was going to appeal. (R. 1867). The trial court then imposed the death sentence. (R. 1867).

The facts germane to question two are set forth in the Eleventh Circuit's decision. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Other relevant facts will be included in the argument section of this response.

REASONS FOR DENYING THE WRIT

I

THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DENYING HABEAS CORPUS RELIEF ON THE CLAIM THAT THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH THE DEFENSE IN ALLOWING BLANCO TO CALL WITNESSES IN HIS OWN BEHALF SUCH THAT PREJUDICE SHOULD BE PRESUMED.

BLANCO complains that the Eleventh Circuit's disposition of his claim that the trial court erred in allowing him to call witnesses in his own behalf is in conflict with this Court's decisions in United States v. Cronic, 466 U.S. 648 (1984), Geders v. United States, 425 U.S. 80 (1976), Perry v. Leeke, 488 U.S. 272 (1989), and Faretta v. California, 422 U.S. 806 (1975).

Assuming without conceding that the Eleventh Circuit properly decided that the trial court erred in allowing BLANCO to call witnesses in his own behalf, the Eleventh Circuit correctly denied habeas corpus relief on this claim. See Contra, Dearinger v. United States, 344 F.2d 309 (9th Cir. 1965); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); North Carolina v. Fullerton, 196 S.E. 2d 578 (N.C. 1973); State v. York, 282 A.2d 759 (N.J. 1971). This is because the Eleventh Circuit correctly refused to apply a standard of presumed prejudice when evaluating the prejudice resulting from the trial court's alleged error. The Eleventh Circuit's decision in this regard is not in conflict with this Court's decisions in United States v. Cronic, Geders v. United States, and Perry v. Leeke. Indeed, the Eleventh Circuit recognized:

> The Supreme Court held in Washington that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

> So are various kinds of state interference with counsel's assistance." Also, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." In United States v. Cronic, the Supreme Court held that prejudice sometimes may be presumed "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Moreover, "The Court has uniformly found constitutional error without a showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."

(Footnotes omitted), Blanco v. Singletary, 943 F.2d 1477,1496 (11th Cir. 1991).

The Eleventh Circuit correctly declined to apply a presumption of prejudice to the facts of this case where although the trial court did rule that BLANCO should be allowed to call those witnesses he believed to be beneficial to him, over his attorney's advice, "this interference was not great, and the particular prejudice showing from it is easily discernible and therefore not costly to litigate." Id. at 1497. "The interference amounted to conuntermanding the attorneys' strategic decision not to call two witnesses, nothing more." Id. The Eleventh Circuit elaborated:

> Blanco's attorneys were not otherwise hampered in their conduct of the guilt phase defense. BLANCO'S attorneys examined the witnesses on the stand. And BLANCO was not prevented from consulting with his attorneys for any period of time. "Basic concepts of due process" were not offended by the trial court's actions. We refuse BLANCO'S invitation to presume prejudice.

Id. Clearly, the Eleventh Circuit correctly declined to presume prejudice under United States v. Cronic, Geders v. United States, and Perry v. Leeke where the putative error did not prejudice BLANCO where

BLANCO was at all times represented by counsel, and there was no breakdown in the adversarial process. United States v. Cronic, 466 U.S. at 662. BLANCO at all times acted with the advice of counsel, even though he chose to ignore it. Furthermore, the witnesses' testimony was mostly beneficial to BLANCO and was cumulative to that of defense witness German Berrios (R. 1508) and Rey Alonso (R. 1336). Because the Eleventh Circuit's decision is not in conflict with United States v. Cronic, Geders v. United States or Perry v. Leeke, this Court should decline review of same.

Likewise, the Eleventh Circuit's decision is not in conflict with Faretta v. California where BLANCO never wanted to proceed pro se and where he at all times acted with his attorneys' advice. The Eleventh Circuit held:

> The district court found that BLANCO never indicated a desire to represent himself and simply asked for a change of counsel, which request was denied. BLANCO is correct that he in effect represented himself as to the single decision to call the two additional defense witnesses. But this brief lapse in representation by counsel does not constitute a total absence of counsel or prohibition from providing assistance such that a presumption of prejudice is appropriate. During BLANCO'S limited period of self-representation, his attorneys advised him as to the reasons they did not think the two additional witnesses should be called. BLANCO thus did have the advice of counsel in making his decision to call Gonzalez and Romero, even if he chose not to follow it.

(Footnotes omitted) Blanco v. Singletary, 943 F.2d at 1497. The Eleventh Circuit's analysis and disposition of this claim was correct and not in conclict with Faretta v. California. Accordingly, this Court should decline review.

II

THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DETERMINING THAT NO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WERE UTILIZED SUCH AS TO INDUCE THE WITNESSES TO MAKE A MISTAKEN IDENTIFICATION.

BLANCO claims that the Eleventh Circuit's rejection of his claim that the identification procedures utilized were unduly suggestive and created a substantial likelihood of misidentification is in conflict with the decisions of this Court. BLANCO'S contentions are without merit.

In disposing of BLANCO'S claim that the eyewitness identifications by Thalia Vezos and George Abdeni were unduly suggestive, the Eleventh Circuit applied the standards set forth by this Court. Specifically, the Eleventh Circuit first determined whether the identification procedures were unduly suggestive and if so, whether under the totality of the circumstances, the identification was reliable. Blanco v. Singletary 943 F.2d at 1508. In determining the reliability, the Eleventh Circuit looked at several factors: (1) the opportunity of the witness to view, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and confrontation. Id. Clearly, the Eleventh Circuit's analysis and disposition of BLANCO'S claim comported with this Court's prior pronouncements in Simmons v. United States, 390 U.S. 377 (1968); Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Braithwaite, 432 U.S. 98 (1977).

Applying these principles, the Eleventh Circuit properly rejected BLANCO'S claim regarding both Thalia Vezos and George Abdeni. With regard to the identification by Thalia Vezos, Petitioner/-Cross-Respondent would point out that this Court has previously rejected BLANCO'S challenge to same. Blanco v. Florida, 469 U.S. 1181 (1985). Indeed, there was no unnecessarily suggestive procedure utilized regarding Thalia Vezos, contrary to BLANCO'S characterization of the facts. Specifically, the description of BLANCO given by Thalia Vezos was not as much the product of police description as witness recall as BLANCO suggests. Immediately after the offense occurred, Thalia Vezos provided a description of BLANCO to police. Vezos described the assailant as a latin male, between 5'8" to 5' 10", 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair (R. 45). The day after the murder she viewed a line-up. When she saw the men to be in the line-up enter the separate room, she immediately recognized BLANCO (R. 91-92). Detective Walley told her to wait and view the entire line-up before making her identification (R. 101-102). She then positively identified BLANCO (R. 102). The five men in the line-up were about the same height (R. 159). Although BLANCO was the only one without a beard, as found by the trial court, "he's got so much hair on his face I guess it looks like he almost has a beard and moustache to me." (R. 158). In addition, BLANCO appeared a few pounds heavier then the other subjects, "but not much" (R. 158). The Eleventh Circuit correctly agreed with the District Court that "BLANCO'S appearance was in no manner substantially distinguishable from the others [in the line-up so as] to render the procedure impermissibly suggestive." Blanco v. Singletary, 943 F. 2d at 1508.

With reference to the alleged discrepancies referred to by BLANCO regarding Vezos' description of color, the number of shots she heard, and what BLANCO wore on his hand, Petitioner/Cross-Respondent would point out that all of these points were raised by the defense on cross-examination of Vezos and emphasized as inconsistencies in her testimony. The jury was told by Vezos herself that she saw "gloves or something like gloves on the man's hands," but "was not able to tell exactly what they were". (R. 912-913). The discrepancies in the color of the jogging suit were likewise presented to the jury (R. 918). In short, Vezos was skillfully cross-examined as to her identification of BLANCO, as the Eleventh Circuit so noted. Id. Petitioner/Cross-Respondent would also point out that contrary to BLANCO'S assertions otherwise, Vezos was not told that the assailant would be in the line-up. The sentence, "that he would be in with the men in the line-up" (R. 90), has been completely taken out of context by BLANCO. Vezos testified that Detective Mundy told her, there would be five men in the line-up, and he, Detective Mundy, would be in the room with the five men, while detective Walley would be in the other room with Vezos. (R. 90). Clearly, Vezos was not told that BLANCO, the assailant, would be in the line-up.

However, even if the line-up was suggestive, the Eleventh Circuit correctly applied this Court's decision in Neil v. Biggers to find that Vezos' identification was reliable under the totality of the circumstances. The Eleventh Circuit held:

> Vezos had an excellent opportunity to view the accused because she was in the presence of the intruder for ten minutes. Also, there was a light on in her room and the hallway. Vezos exhibited a high level of certainty in her identification, as she pointed out Blanco the instant he walked into the lineup room; the police

> officer accompanying her had to instruct her to wait until she had seen all the men before making a positive identification. Finally, the length of time between the crime and the identification was brief: The lineup identification occurred the day after the crime. We also note that Vezos was extensively cross-examined concerning discrepancies between her statement to the police and her identification, and the jury was able to weigh these discrepancies in reaching its verdict. The lineup identification was sufficiently reliable to be admissible.

Blanco v. Singletary, 943 F.2d at 1508.

Regarding the identification made by George Abdeni, the Eleventh Circuit, applying the same principles announced by this Court, held:

> In this case, Blanco was simply presented to Abdeni. The police did not aggravate the suggestiveness of the encounter. While Abdeni's identification was certainly less reliable than that of Vezos' identification, it does possess the attribute of having been made quite soon after the initial sighting. Also, defense counsel fully pointed out to the jury the various problems with Abdeni's identification.
>
> If this were the only evidence of Blanco's guilt, it would not be sufficient to support the conviction. However, the other evidence introduced at trial, particularly Thalia Vezos' identification, made Abdeni's identification cumulative. The error here, if any, was harmless beyond a reasonable doubt. We do not find that the district court erred in refusing relief on this issue.

Id. at 1508-1509.

The record supports the Eleventh Circuit's ruling on this claim. At the evidentiary hearing on the motion to suppress identification, George Abdeni testified that he lived across the street from the Vezos' house. (R. 63). At about 11:00 p.m. he heard a few very faint shots, and then a young girl shouting. He looked through his window and saw a person dressed in gray jogging suit pass by the house. (R. 65-66). The person was about 20 to 25 feet away, and he could not tell if it was a

man or a woman. (R. 67-68). About an hour later, he heard one of the policemen tell someone that they had a suspect. (R. 68). Abdeni saw a man who he did not recognize sitting in the back of the police car. (R. 73). BLANCO was taken from the police car, with his handcuffs off, and told to stand by a tree approximately 15 yards away. (R. 55). Abdeni viewed the silhouette and told the police that he recognized the jogging suit (R. 69), and form of the person. (R. 75). The trial court did not find the procedure to be suggestive (R. 159), and not prejudicial in that Abdeni could not identify BLANCO, but only the clothing and the form. (R. 150). At trial Abdeni did not identify BLANCO as being the person he saw in the jogging suit. Rather, he only identified the clothing and type of body structure of the person he saw leaving the scene. Further, he did not identify the form as a women as BLANCO suggests. (R. 794-796).

Petitioner/Cross-Respondent thus maintains the correctness of the Eleventh Circuit's ruling on this issue. Under this Court's decisions in Simmons v. United States, Neil v. Biggers, and Manson v. Braithwaite, the out of court and in court identifications of BLANCO by Thalia Vezos and George Abdeni were properly admissible.

BLANCO having failed to demonstrate a conflict between the Eleventh Circuit's decision below and any decision by this Court, has not shown any reason for this Court to grant review. See Rule 10, Rules of the Supreme Court of the United States. His petition for Writ of Certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, the Petitioner/Cross-Respondent respectfully requests that this Court deny Omar Blanco's Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Cross-Petition for Writ of Certiorari was forwarded by U.S. Mail to: Billy H. Nolas and Julie D. Naylor, P.O. Box 4905, Ocala, Florida 32678-4905, counsel for Omar Blanco, Respondent this 1st day of ~~April~~ May, 1992.

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